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**BUREAU OF SPECIAL EDUCATION APPEALS
DECISIONS**

**VOLUME 44
pp. 44-1 - 44-261**



The Commonwealth of Massachusetts Department of Education

1385 Hancock Street, Quincy, Massachusetts 02169-5183

JANUARY, 1993

The Bureau of Special Education Appeals is publishing decisions rendered by hearing officers in Chapter 766 cases since the implementation of the law in 1974. This 44th volume contains 17 recent BSEA decisions.

The decisions are categorized by issues addressed in the body of the decision. All volumes contain an index code which assigns numbers to each issue, and an index that lists beginning page numbers to all decisions in that volume by category.

These decisions have been printed in a limited number and disseminated throughout the Commonwealth of Massachusetts. Decisions may be copied, but volumes should remain at the depository. A list of depositories of these decisions is available from the Bureau.

This is a sample of the cover sheet attached to all decisions.

BUREAU OF SPECIAL EDUCATION APPEALS

APPELLANT

V.

PUBLIC SCHOOLS

APPELLEE

BEFORE

_____, BSEA HEARING OFFICER

_____, ESQ., FOR APPELLANT

_____, ESQ., FOR APPELLEE

This is a sample of information attached at the end of each decision.

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

NOTICE OF REVISED BUREAU PROCEDURES

The United States Department of Education, Office of Special Education Programs (OSEP) in its 1990 Monitoring Report, issued July 17, 1991, has ordered the Bureau to amend its procedures to eliminate the availability of reconsideration or re-opening as post-decision procedures in Bureau cases. Accordingly, parties are notified that the Bureau will no longer entertain motions for reconsideration or to re-open. Bureau decisions are final decisions subject only to judicial review.

Although there is no definitive court ruling in this jurisdiction determining the time by which an appeal of a Bureau decision must be filed in state or federal court, parties are advised that the courts may apply the 30 day time limitation to State Administrative Procedures Act. Under G.L. c.30A an appeal of a Bureau decision must be filed within 30 days of receipt of the decision by the appealing party.

DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

EFFECT OF BUREAU DECISION AND RIGHTS OF APPEAL

EFFECT OF DECISION AND RIGHTS OF APPEAL

The decision of the Bureau of Special Education Appeals is final and is not subject to further agency review. Because 20 U.S.C. s.1415(e)(2) requires the Bureau decision to be final and subject to no further agency review, the Bureau cannot permit motions to reconsider or to re-open a Bureau decision, once it is issued. Any party aggrieved by the Bureau decision may file a complaint in the Superior Court of competent jurisdiction or in the District Court of the United States for Massachusetts for review of the Bureau decision. 20 U.S.C. s.1415(e)(2). Under Massachusetts General Laws Chapter 30A, Section 14(1), appeal of a final Bureau decision must be filed within 30 days of receipt of the decision.

Except as set forth below, the final decision of the Bureau must be implemented immediately. Under G.L. c.30A, s.14(3), appeal of the decision does not operate as a stay; rather, a party seeking to stay the decision of the Bureau must seek such stay from the court having jurisdiction over the party's appeal.

Under the provision of 20 U.S.C. s.1415(e)(3), "unless the State or local education agency and the parents or guardian agree otherwise, the child shall remain in the then current educational placement," during the pendency of any judicial appeal of the Bureau decision, unless the child is seeking initial admission into school, in which case "with the consent of the parents or guardian, the child shall be placed in the public school program," 20 U.S.C. s.1415(e)(3). Where the Bureau has ordered the public school to place the child in a new placement, and the parents or guardian agree with that order, the public school shall immediately implement the placement ordered by the Bureau. School Committee of Burlington, v. Massachusetts Department of Education, 471 U.S. 359 (1985). Otherwise, a party seeking to change the child's placement, during the pendency of judicial proceedings, must seek a preliminary injunction from the court, having jurisdiction over the appeal, ordering such a change in placement. Doe v. Brookline, 722 F.2d 910 (1st Cir. 1983); Honig v. Doe, 484 U.S. 305 (1988).

RECORD OF THE HEARING

The Bureau of Special Education Appeals will provide an electronic verbatim record of the hearing to any party, free of charge, upon receipt of a written request. Pursuant to M.G.L.

c.30A, §11(6), §14(4), an appealing party seeking a certified written transcription of the entire proceedings, must arrange for the transcription, or portion thereof, at their own expense. Transcripts prepared by the party must be submitted to the Bureau of Special Education Appeals for certification. A party unduly burdened by the cost of preparation of a written transcript of the sound recordings may petition the Bureau of Special Education Appeals for relief.

COMPLIANCE

A party contending that a decision of the BSEA is not being implemented may file a complaint with the Department, whose responsibility it shall be to investigate such complaint. 603 C.M.R. s.28.00, §340.0.

In addition, the party shall have the option of filing a motion with the Bureau of Special Education Appeals, requesting the Bureau to order compliance with the decision. The motion shall set out the specific area of alleged non-compliance. The Hearing Officer may convene a hearing at which the scope of inquiry will be limited to facts bearing on the issue of compliance, facts of such nature as to excuse performance and facts bearing on a remedy. Upon a finding of non-compliance, the Hearing Officer may fashion appropriate relief and refer the matter to the Legal Office of the Department of Education for enforcement.

CONFIDENTIALITY

In order to preserve the confidentiality of the child involved in these proceedings, when an appeal is taken to Superior Court or to Federal District Court, the parties are strongly urged to maintain the confidentiality of these proceedings by filing the complaint without identifying the true name of the parents or the child, and to move that all exhibits, including the transcript of the hearing before the Bureau of Special Education Appeals, be impounded by the court. See, Webster Grove School District v. Pulitzer Publishing Company, 898 F.2d 1371 (8th Cir. 1990). If the appealing party does not seek to impound the documents, the Department of Education, through the Attorney General's Office, may move to impound the documents.

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3/2/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: WILLIAM D.

BSEA #88-0688

DECISION

This decision is rendered pursuant to M.G.L. Chapters 15, 30A and 71B; 20 U.S.C. 1401 et seq.; and all of the regulations promulgated under each of these statutes.

A hearing in the above entitled matter was held on May 20, 21 & 22, 1991. The record remained open for written final arguments until October 31, 1991. Both parties then requested the opportunity to submit supplemental response briefs. The record closed on February 28, 1992.

Those in attendance were:

William D.	Father
Sheila D.	Mother
William D.	Student
Clara Maslow	Parents' Consultant
Martin Ames	Attorney for Parents/Student
Grace Day	Director of Special Education, Mashpee Public Schools
Beth Foley	School's Consultant
Pamela Kauffman	Director, Bureau of Program Audit and Assistance, Department of Education
Richard Sullivan	Attorney for Mashpee Public Schools
Carol DiFazio	Court Reporter
Linda Allan	Court Reporter
Louise Tehan	Court Reporter
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Parents' Exhibits labelled P-1 through P-20; Mashpee Public Schools' Exhibits labelled S-1 through S-71; and approximately 12 hours of oral testimony.

STATEMENT/HISTORY OF THE CASE

This case comes to the Bureau of Special Education Appeals (BSEA) pursuant to a remand order from the United States District Court, District of Massachusetts, C.A. No. 84-804-WF (Wolf, D.J.) dated February 1, 1988. This case has a long, convoluted procedural history which, for as much clarity as is possible

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under the circumstances, is summarized below in chronological fashion.

In January 1983 the Mashpee Public Schools (Mashpee) proposed a 502.4 prototype Individual Education Plan (IEP) for William D. (Billy) in Mashpee's Intensive Language Program (ILP) covering January 1983 through June 1983 (P-11; S-66). Parents rejected this IEP and proposed that Billy be placed in a 502.4(i) prototype program in the Marconi School located in Wellfleet, MA and administered by the Nauset Public Schools. The BSEA conducted a two day hearing in late June 1983 and on August 31, 1983 the BSEA (Sandra Sherwood, Hearing Officer) rendered a Decision (BSEA #83-0252) ruling that Mashpee's proposed 502.4 IEP was appropriate to meet Billy's special education needs and ordered Mashpee to "develop a 1983-84 IEP calling for a 502.4 prototype placement for Billy in the Intensive Language Program." (P-3; S-57). On October 18, 1983 the team met to review Billy's IEP and then sent Parents a letter indicating that Billy's IEP had been reviewed and requesting permission to evaluate Billy which was not granted. (S-64; testimony, Mr. D.). On October 25, 1983 Mashpee sent Parents a draft IEP (S-63) followed by a complete IEP in January 1984 which was never signed by Parents. (P-12, 12a; S-61). At the same time Parents appealed the BSEA Decision to the State Advisory Commission (SAC) which rendered a Tentative Decision on November 8, 1983 affirming the BSEA Decision. On January 10, 1984 the SAC issued a New Tentative Decision which overturned the BSEA Decision and the SAC's own original Tentative Decision. On February 16, 1984 the SAC issued a Final Decision, formalizing their New Tentative Decision of January 10, 1984. However, the SAC ordered no alternative placement. (See P-3, 4). In March 1984 Mashpee appealed the SAC's Final Decision to U.S. District Court (S-57).

On June 7, 1984 Mashpee again requested Parents' permission to re-evaluate Billy for the purpose of reviewing and updating his IEP but such permission was not granted. (S-52; testimony, Mr. D.). During the summer of 1984 Parents filed a motion for a preliminary injunction in U.S. District Court to order Mashpee to enroll Billy in the Marconi School for the 1984-85 school year and to pay tuition and transportation costs related to the Marconi placement (S-45). On September 11, 1984 the SAC "clarified" its Final Decision finding the Marconi placement the least restrictive appropriate placement for Billy (P-3).

During the 1983-84 school year Billy had attended school in Mashpee under his last agreed upon placement/IEP (1981-82), under which he received partial services within the ILP and the rest of his time spent within mainstreamed regular education classes. Without notice to Mashpee, Parents did not allow Billy to attend school in Mashpee beginning in September 1984, choosing instead to keep him at home and provide private tutoring on their own. (See testimony of Mr. D.). On September 24, 1984 Mashpee wrote to Parents to encourage his attendance and to again request permission to re-evaluate Billy which was not granted. (S-50;

testimony, Mr. D.). On October 22, 1984 Mashpee's attorney wrote to Parents' then current attorney regarding Billy's lack of school attendance, Mashpee's attempted contacts, Parents' lack of response, and Mashpee's willingness to provide education services to Billy on an immediate basis so that his deficits and disabilities would not increase (S-49). On October 24, 1984 Parents' attorney responded to Mashpee's attorney stating that pending a ruling on Parents' motion for a preliminary injunction to place Billy at Marconi School, Parents would only be willing to discuss Billy's placement at Marconi School (S-48). On November 30, 1984 Parents' attorney attempted to allow Parents to place Billy at Marconi School pending a decision on the preliminary injunction (S-47) which was rejected by Nauset on December 4, 1984 since Marconi, as a public school program, only considered referrals from other public schools (S-46).

On December 18, 1984 U.S. District Court Judge Rya Zobel denied Parents' motion for a preliminary injunction to place Billy at Marconi School because Parents had failed to establish a likelihood of success on the merits (S-45). On January 4, 1985 Mashpee wrote to Parents reiterating its commitment to provide for Billy's special education needs and to work together to develop and implement his educational program; and given his absence from school for $\frac{1}{2}$ year plus the period of time that had transpired since his last full re-evaluation, requested permission to conduct a full re-evaluation, which was not consented to by Parents. (S-44; testimony, Mr. D.). On January 23, 1985 Parents privately and unilaterally enrolled Billy at Leland Hall School as a residential student. (P-13; S-43; testimony, Mr. D.). Leland Hall was then a Massachusetts Department of Education (MDOE) approved private day (502.5) and residential (502.6) school for special education students. On May 3, 1985 Mashpee again requested permission to evaluate Billy to complete the data necessary for a new IEP. Parents did not consent to such re-evaluation. (S-42; testimony, Mr. D.).

In September 1985 Parents discontinued Billy's enrollment at Leland Hall as a residential student but privately and unilaterally enrolled him at Leland Hall as a private day school student. Billy remained at Leland Hall as a private day school student for the entire 1985-86 school year. (P-14; S-41; testimony, Mr. D.).

On July 10, 1986 Parents requested a hearing before the BSEA raising claims regarding the 1983-84, 1984-85 and 1985-86 school years (S-40). On July 22, 1986 the BSEA (Hearing Officer Lindsay Byrne) dismissed Parents' claims as follows:

After careful consideration of the parties' arguments and of the principles of administrative law, it is my conclusion that a full BSEA hearing on the parents' claims concerning the 1983-1984, 1984-1985, and 1985-1986 school years would be inappropriate at this time. The Federal Court is

currently considering its jurisdiction over, and possibly the merits of, those claims. The Bureau must defer to the higher authority of the Federal Court. Should the Court assume jurisdiction and determine the parties' claims regarding prior school years, there will be no basis for further Bureau involvement. On the other hand, should the Court decide that it lacks jurisdiction to decide those claims, the Bureau will then be the proper forum for resolving the factual and legal issues involved. Therefore the most appropriate course of action is to await the decision of the Court in Civil Action No. 84-804-W. (S-39 -- BSEA #86-1056).

However, Hearing Officer Byrne agreed to hear any appeal regarding the 1986-87 school year since Mashpee continued to offer immediate placement of Billy in the ILP, Parents now agreed to share with Mashpee their updated assessments of Billy and to allow Mashpee to evaluate Billy, and when all assessments were completed the team would convene and develop a new IEP. Hearing dates were reserved for October 1986. (See S-34, 37, 38, 39).

On August 25, 1986 the U.S. District Court delivered its Decision. In an extensive and detailed 55 page Decision, Judge Wolf reversed the Final Decision of the SAC because it failed to meet both the procedural and substantive requirements of federal and state law. Judge Wolf affirmed the BSEA Decision and found that Mashpee's proposed IEP for the 1983-84 school year provided Billy with the maximum feasible benefit in the least restrictive alternative to a regular education program. The Court reserved judgment on several outstanding issues including the propriety of the Parents' decision to place Billy at Leland Hall and the related question of whether Mashpee must reimburse Parents for their costs incurred as a result of their decision. The Court granted the parties time to attempt to settle these outstanding issues and, if not, to submit briefs regarding whether it would be more appropriate for the Court or the state administrative agency to decide in the first instance the propriety of Billy's placement in the years subsequent to the 1983-84 school year. (See S-35 for Judge Wolf's complete Decision). Judge Wolf's Decision has never been appealed by either party.

On August 27, 1986 Mashpee wrote to Parents (S-34) noting as follows:

As in the past and in accord with the BSEA decision, I continue to offer you immediate placement for your son in our Intensive Language Program at the Mashpee Middle School. Once all assessments have been completed, the Team will convene and a new and appropriate educational plan will be written.

On September 2, 1986 Parents informed Mashpee that Billy would return to the Mashpee Public Schools the next day (S-33). On September 4, 1986 Mashpee wrote an interim, abbreviated two-month 502.4 IEP for Billy in the ILP pending completion of its evaluation and team meeting (S-32). On September 9, 1986 Mr. D. refused to sign the IEP (S-30). Parents gave Mashpee weekly permission letters to continue the interim IEP. (See S-13, 15, 16, 18, 19, 21, 22). Mashpee assessments of Billy were completed in late September and early October 1986. (See S-24, 25, 26, 27). A team meeting took place on October 9, 1986 (S-14) and an IEP covering 10/86 through 10/87 placing Billy in the ILP under a 502.4 prototype program was sent to Parents on October 17, 1986 (S-11). Parents rejected this IEP on November 6, 1986 (S-9). Meanwhile, the BSEA hearing regarding Mashpee's 1986-87 IEPs for Billy (BSEA #86-1056) commenced on October 16 & 20, 1986 with Parents requesting that Mashpee place Billy back at Leland Hall. After these two days of hearing, Hearing Officer Byrne recused herself from this case (S-8) which was re-assigned to Hearing Officer Reece Erlichman who scheduled the hearing for November 13, 1986 (S-7). On January 29, 1987 Mr. D. revoked his permission for Billy to remain in the ILP (S-6). On January 30, 1987 Mashpee offered to make modifications which were all unacceptable to Mr. D., resulting in Billy being placed in regular education for all subjects except a math tutorial in the resource room (S-4). On March 3, 1987 Mr. D. revoked his permission for Billy to attend even resource room math (S-3) resulting in Billy being mainstreamed for regular education math (S-2). On May 21, 1987 Hearing Officer Erlichman, subject to either party's rejection within 10 working days, dismissed BSEA #86-1056 due to the parties not proceeding to hearing on this case (S-1). There was no response from either party.

In the federal court appeal, the parties were unable to reach settlement of the outstanding issues regarding the 1984-85 and 1985-86 school years. It is uncontroverted that no IEPs were prepared by Mashpee for Billy for either the 1984-85 or 1985-86 school years. On February 1, 1988 Judge Wolf remanded the case to the BSEA ruling as follows (P-2):

The parties agree that the court has the authority to decide the open issues concerning the school years 1984-1985 and 1985-1986, but also has the discretion to remand these questions to the BSEA, to which the Does took an administrative appeal concerning the school years now at issue. The Does favor a remand. The Mashpee School Committee opposes a remand...

...the court has concluded that it would be most appropriate and desirable for the BSEA to address, at least initially, all factual and legal issues relating to the placement of Johnny Doe for the school years 1984-1985 and 1985-1986.

Hearing was scheduled before the BSEA for February 29, 1988. Both sides requested continuances. Mr. D. retained new counsel, changing from Attorney Houghton to Attorney Whalen. Counsel for both parties then entered into extensive settlement negotiations which were unsuccessful. In June 1989 Attorney Whalen filed a motion to withdraw as Parents' counsel. In September 1989 Attorney Ames became Parents' current counsel and requested a pre-hearing conference for November 1989. A pre-hearing conference was held on November 17, 1989. Parties then again entered into extensive settlement negotiations. On August 7, 1990 Parents' counsel reported that since the November 17, 1990 pre-hearing conference the parties had worked diligently in an attempt to settle this appeal but had been unsuccessful and requested that a final pre-hearing conference be scheduled. Negotiations continued to take place but a final pre-hearing conference was scheduled and took place on October 30, 1990. The Hearing Officer summarized the results of this final pre-hearing conference in an October 30, 1990 Memorandum to the parties delineating that discovery, status reports and stipulations/agreed statements of facts were to be completed by January 31, 1991 and a hearing on the merits scheduled for March 5, 6 & 7, 1991. On January 7, 1991 Parents' counsel requested a continuance regarding both status reports and the commencement of the appeal, which was assented to by Mashpee's counsel on January 9, 1991. Status reports were filed in late April 1991 and the hearing on the merits took place on May 20, 21 and 22, 1991.

ISSUES

1. Did Mashpee's failure to provide IEPs for Billy for the 1984-85 and 1985-86 school years violate state and/or federal special education law?
2. Did Mashpee's failure to propose IEPs for Billy for the 1984-85 and 1985-86 school years mandate that Parents' unilateral actions of providing Billy with home tutoring for the first semester of the 1984-85 school year; placement of Billy at Leland Hall as a private residential student for the second semester of the 1984-85 school year; and placement of Billy at Leland Hall as a private day school student for the entire 1985-86 school year; be reimbursed by Mashpee?

STATEMENT OF POSITIONS

Parents' position is: 1) Mashpee was obligated to prepare IEPs for Billy for the 1984-85 and 1985-86 school years pursuant to applicable state and federal statutes and regulations. 2) Due to Mashpee's failure to provide IEPs for the 1984-85 and 1985-86 school years, Parents were compelled to find and provide appropriate educational services for Billy given his educational handicaps and his need for unique educational programing, and Parents did so, at their own expense, through home tutoring and their placements of Billy at Leland Hall. 3) Because Mashpee violated its legal obligations, Parents are entitled to

reimbursement for their unilateral provision of services and placements for Billy during the 1984-85 and 1985-86 school years. 4) Parents are entitled to their attorneys fees and costs.

Mashpee's position is: 1) the U.S. District Court ultimately determined that the IEP proposed by Mashpee placing Billy in its Intensive Language Program was appropriate. Since Parents unilaterally changed Billy's educational placement, they are barred from obtaining reimbursement for any interim period in which Billy's placement violated 20 U.S.C. 1415(e)(3). 2) Mashpee discharged any duty it may have had to write IEPs for Billy for the 1984-85 and 1985-86 school years. Although Mashpee did not formally develop written IEPs for the 1984-85 and 1985-86 school years, it continued to offer special education services and placement within its Intensive Language Program and Parents were aware of the availability of such services. 3) Both residential and day placements at Leland Hall were overly restrictive and inappropriate for Billy. 4) Parents are not entitled to any award for attorney's fees and costs.

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that William D. is a student with special education needs as defined under state and federal statutes and regulations; and that Mashpee promulgated no IEPs for William D. for either the 1984-85 or the 1985-86 school years. The parties are also in essential agreement regarding the general nature, extent and manifestations of Billy's special education needs. (See testimony of Dr. Foley; Dr. Maslow; P-18, 19; S-24, 25, 26). The fundamental issues to be determined are those listed under ISSUES IN DISPUTE, above.

Based upon 2 3/4 days of oral testimony, the extensive written documentation introduced into evidence, and a review of the applicable law, I conclude as follows:

- I. Mashpee did have the legal obligation to prepare IEPs for Billy for the 1984-85 and 1985-86 school years as required by state and federal special education law, and its failure to do so violated such law.
- II. Pursuant to 20 U.S.C. 1415(e)(3) and 34 CFR 300.513, and based upon the facts of this case, Billy's placement pending appeal during the 1984-85 and 1985-86 school years was Mashpee's Intensive Language Program as promulgated by Mashpee and consented to by Parents in Billy's 1981-82 IEP. Pursuant to federal case law interpreting placement pending appeal rights and parental right to reimbursement for unilateral placements, and based upon the facts of this case, Parents are barred from obtaining reimbursement for their unilateral changes of Billy's placement to home tutoring and Leland Hall programs during this placement pending appeal period.

- III. Based upon the facts of this case, although Mashpee wrote no formalized IEPs for Billy for the 1984-85 and 1985-86 school years, special education services and placement within the ILP consistent with Billy's placement pending appeal rights, consistent with the original BSEA Decision, and consistent with the ultimate U.S. District Court Decision were offered to Parents; Parents were clearly aware of the availability of such services; and such services and placement were appropriate to address Billy's special education needs so as to assure his maximum possible educational development within the least restrictive educational environment.
- IV. There is no justification in which to order reimbursement for Billy's home tutoring during the first semester of the 1984-85 school year. Further, Parents have presented insufficient evidence that Leland Hall was appropriate to address Billy's special education needs or that Billy required the restrictiveness of either a private residential or private day school in order to address his special education needs during the second semester of the 1984-85 school year or the 1985-86 school year.
- V. Pursuant to 20 U.S.C. 1415(e)(4) the authority to award attorney's fees is within the sole discretion of the federal courts.

My analysis follows.

I.

Mashpee concedes that it held no team meetings and prepared no IEPs for Billy for either the 1984-85 or 1985-86 school years. (Stipulation; Testimony, Ms. Day). State and federal special education statutes and regulations require that IEPs be reviewed and provided to each special education student on at least an annual basis. See M.G.L. c.71B s.3; 20 U.S.C. 1401(19); 20 U.S.C. 1414(a)(5); 603 CMR 28.333.0; 34 CFR 300.343. Further, in Town of Burlington v. Department of Education 736 F.2d 773 (1st. Cir. 1984) (Burlington II) the U.S. Court of Appeals for our Circuit held:

The regulations plainly prescribe that IEP review shall occur regardless of whether parents participate or whether a reevaluation of the child occurs. The Town's IEP responsibilities were therefore not excused by the parents' refusal to make John available, and accordingly no advantage should accrue to the Town by dint of its failure to prepare IEPs during the subsequent years of this litigation. 736 F.2d at 795.

Burlington II also clarified a local education authority's responsibility to promulgate IEPs pending review. The Court held as follows:

The federal act omits any reference to whether IEPs are to be revised during the pendency of review. We, therefore, must fashion a rule to facilitate implementation of the act. We think that pending review of an earlier IEP, local education agencies should continue to review and revise IEPs in accordance with applicable law, at least in the absence of a stipulation between the parties providing for how the outcome of the suit will affect later years. Without the IEP as a starting point, the court is faced with a mere hypothesis of what the Town would have proposed and effectuated in subsequent years, an hypothesis which at the time of trial would have the unfair benefit of hindsight. 736 F.2d at 794.

Therefore, neither pending court review nor Parents' lack of consent for Mashpee to evaluate Billy or to work with Mashpee relieves Mashpee of its responsibility to have developed IEPs for Billy for the 1984-85 and 1985-86 school years.

I appreciate Mashpee's argument that attempting to promulgate an IEP for Billy:

was a pre-ordained exercise in futility, as Mashpee was left with the option of producing meaningless and empty IEPs based upon information in its possession that was at least two years old. Plainly, Congress did not establish the IDEA to require local education agencies to churn out IEPs with no appropriate goals, objectives or teaching methodologies merely to comply with a timeline. Mashpee closing argument pp 31-32.

However, such admittedly less than accurate IEPs would have provided that Burlington II "starting point" demonstrating the type of program and the approximate level of service delivery Mashpee would have provided given the limited and dated information that was available to it. Had this been done, consistent with Burlington II:

IEPs for subsequent years could be appealed to the state agency; and appeals from the state agency's "findings and decisions" on the subsequent IEPs could be consolidated with the original appeal to the district court. The continuation of the IEP process during the pendency of litigation may assist in promoting settlements. Also, subsequent IEPs that have not been appealed to the state agency may still provide useful evidence for the district court in fashioning "appropriate" relief, see *infra*. 736 F.2d 773 at 794.

Burlington II also provides:



Despite the absence of any reviewable "findings and decision" by the state agency for subsequent years, the district court has authority with respect to those years under its power to grant appropriate relief incident to its determination concerning the contested IEP for the initial year, 1979-80. 736 F.2d at 795.

Therefore, if Mashpee had 1) developed IEPs for the subsequent years of 1984-85 and 1985-86 and these IEPs had been appealed to the BSEA, decided by the BSEA and consolidated with the original court appeal; or 2) developed IEPs for the subsequent years of 1984-85 and 1985-86 which had not been appealed to and decided by the BSEA but would have been available as useful evidence for the district court in granting relief; the district court may have exercised its authority to decide the open issues concerning the school years 1984-85 and 1985-86 (See Remand Order P-2, pp 1-2) rather than having felt the necessity to remand this case to the BSEA. Promulgation of 1984-85 and 1985-86 IEPs by Mashpee for Billy might have saved the parties these additional years of litigation, administrative time of the BSEA, and the additional court time required if either party seeks a return to U.S. District Court to appeal this Decision, which appears to be a certainty given the positions of the parties in this case.

Given Mashpee's failure to fulfill its legal obligations to prepare IEPs for Billy for the 1984-85 and 1985-86 school years, I now turn to what, if anything, is Parents' remedy based upon statute, regulations, case law, and the particular facts of this case.

II.

20 U.S.C. 1415(e)(3) provides, in relevant part:

During the pendency of any proceedings conducted pursuant to this section, unless the State or local education agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, ...
(See also 34 CFR 300.513; 603 CMR 28.327.2).

Thus, absent any parent and local education authority (LEA) agreement or parental agreement with the BSEA Decision, placement pending appeal becomes the student's last agreed upon placement i.e., the last IEP proposed by the LEA that was accepted by the parents.

Court decisions have interpreted 20 U.S.C 1415(e)(3) to provide a flexible approach to meet the needs of the child and the LEA to avoid inequities which may result by retaining a child in an educational placement found appropriate by the state administrative agency which may be subsequently found

inappropriate by the court on appeal. In Doe v. Brookline School Committee 722 F.2d 910 (1st Cir. 1983) the U.S. Court of Appeals for this Circuit ruled: 1) that a motion for a preliminary injunction was the proper mechanism for determining which party should bear the interim costs for funding a private parental placement pending court appeal and 2) that a preliminary injunction was the the proper mechanism to utilize for any party seeking modification of the existing educational placement or state administrative agency decision. See 722 F.2d at 917-919.

Burlington II provides a "safe harbor" for parents who rely on a state administrative agency decision ruling an LEA placement inappropriate and ordering the LEA to fund parents' proposed placement when parents/LEA have complied with that administrative order, even when such order is later overturned by the court on appeal. In such instances LEAs are estopped from obtaining reimbursement from the parents for the time period, usually one year, covered by the state agency's decision and order. 736 F.2d 773 at 800-801.

Burlington II also provides that parents' unilateral transfer of their child does not constitute a bar to reimbursement under the EHA (now IDEA) if parents' actions are held to be appropriate at final judgment. 736 F.2d 773 at 795-797. (See also Burlington School Committee v. Massachusetts Department of Education 105 S. Ct. 1996 (1985) at 2004; Doe v. Brookline School Committee 722 F.2d 910 at 916). The Doe v. Brookline decision also notes:

We conclude that permitting reimbursement promotes the purpose and policy of the Act. If the parents are incorrect in their claim that the IEP provides an inappropriate education for their child, they, like any other parents, should bear the financial burden of giving their child a private education. If the school committee's proposed placement is held inappropriate, then through reimbursement all parties are restored to the position the Act sought to achieve. 722 F.2d at 922.

In Burlington II the U.S. Court of Appeals for our Circuit affirmed its Brookline ruling that parents bear the financial risks in unilaterally changing their child's educational placement pending appeal holding:

...as we held in Brookline, reimbursement will not be available to parents if it turns out that the school system had proposed and had the capacity to implement an appropriate IEP. 736 F.2d 773 at 798.

Reimbursement must be denied to the parents if the school system proposed and had the capacity to implement an appropriate IEP. 736 F.2d at 799.

Finally, in Burlington School Committee v. Massachusetts Department of Education 105 S. Ct. 1996 (1985) the United States Supreme Court interpreted 20 U.S.C. 1415(e)(3)'s impact regarding a student's educational placement pending judicial appeal as follows:

...we think it operates in such a way that parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3). 105 S. Ct. at 2005.

To summarize and synthesize the proceeding court decisions:

- 1) Parents always retain the right to unilaterally place their child in whatever educational program or placement they wish.
- 2) Parents are not entitled to LEA funding for such unilateral placement pending court appeal if parents have lost at the administrative agency level (i.e., the Hearing Officer has found the LEA's proposed program appropriate to address the student's special education needs) unless they have prevailed on a motion for a preliminary injunction in court and the court orders the LEA to fund parents' unilateral placement pending appeal.
- 3) If parents have prevailed at the administrative agency level (i.e., the Hearing Officer has ruled that the LEA's proposed program is inappropriate, the parents' unilateral placement is appropriate and orders the LEA to fund parents' unilateral placement), pending court appeal (absent any preliminary injunction to the contrary), parents are entitled to rely upon the administrative agency decision; the LEA is required to fund such unilateral placement for the term of the IEP at issue/the length of the Hearing Officer's Decision; and the LEA is estopped from obtaining reimbursement from parents for such time period even if the administrative agency decision is ultimately overturned by the courts. The maximum time for parents' reliance on this "safe harbor" is one year. The LEA must continue to pay for such unilateral placement pending court appeal (absent a preliminary injunction to the contrary) but beyond the "safe harbor" period the LEA can seek reimbursement from parents if the LEA ultimately prevails and the administrative agency decision is overturned by the courts.
- 4) If parents have unilaterally placed their child in a private placement, have lost at the administrative agency level, have lost in their attempt for a preliminary injunction (or have not sought a preliminary injunction and paid for the private placement themselves), but prevail at final court judgment, parents' unilateral placement does not constitute a bar to reimbursement to parents by the LEA.
- 5) In all situations except for the "safe harbor" provisions of Burlington II, in unilaterally changing their child's educational placement pending any appeals, parents bear the ultimate financial risk of their

action. If the court ultimately determines that the IEP proposed by the LEA was appropriate, parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated 20 U.S.C. 1415(e)(3).

In the instant case, as delineated under HISTORY/STATEMENT OF THE CASE above, Parents did not prevail at the administrative agency level. In August 1983 Mashpee's proposed 502.4 IEP for its Intensive Language Program was found to be appropriate to address Billy's special education needs by the BSEA. The SAC then tentatively affirmed, then tentatively reversed, then reversed the BSEA Decision. Mashpee appealed the SAC reversal of the BSEA Decision to U.S. District Court. In the summer of 1984 Parents filed a motion for a preliminary injunction to order Mashpee to place and fund Billy at Marconi School, Parents' desired placement for Billy. In December 1984 the U.S. District Court denied Parents' request for a preliminary injunction since Parents had failed to establish a likelihood of success on the merits. In August 1986 the U.S. District Court reversed the SAC, found Mashpee's proposed IEP to be appropriate and affirmed the original BSEA Decision through the 1983-84 school year. At all times during the 1983-84 school year Billy remained at Mashpee Middle School under his last accepted IEP (1981-82) except as allowed to be modified via Parental consent.

Applying these facts to the court cases cited above, I conclude that there is no basis upon which to order Mashpee to fund Parents' unilateral home tutoring, private residential and private day school placements at Leland Hall under any placement pending appeal theory. Parents' position did not prevail at the administrative agency level, in their request for a preliminary injunction in federal district court, or at final judgment at federal district court. Mashpee's proposed IEP for Billy in its ILP has been found appropriate at each critical point of this litigation. Parents had no "safe harbor" to rely upon in order to justify their unilateral home tutoring or Leland Hall placements. In unilaterally changing Billy's educational placements pending judicial appeal, Parents must bear the financial risks and burdens of their actions since the U.S. District Court has concluded that the IEP proposed by Mashpee was appropriate to address Billy's special education needs. Therefore, Parents are barred from obtaining reimbursement for the interim time period in which Billy's placement violated 20 U.S.C. 1415(e)(3) and his placement violated §1415(e)(3) for the entire 1984-85 and 1985-86 school years.

Parents argue in their closing brief (page 21) that placement pending appeal was Marconi School via the SAC reversal of the BSEA Decision, and since Marconi was never implemented by Mashpee that Parents are entitled to a "safe harbor" for their unilateral home tutoring and residential and day placements at Leland Hall. I do not agree. First, Judge Wolf's Decision amply and vividly demonstrates that the SAC's actions were totally unfounded both substantively and procedurally, not based upon the

evidence before the BSEA, and beyond the SAC's discretion. Second, although the SAC reversed the BSEA Decision in January 1984, it never found the Marconi placement the least restrictive placement for Billy until September 11, 1984.* Assuming, arguendo, that Burlington II's "safe harbor" applied in this case, any safe harbor the Parents gained from the SAC actions would have encompassed only the 1983-84 school year, during which time Billy had remained in Mashpee under his last agreed upon IEP. Consequently, even assuming a "safe harbor" and assuming the SAC's actions to be correct, by the time the SAC designated Marconi School to be appropriate for Billy on September 11, 1984, any "safe harbor" period would have expired and did not extend into and through the 1984-85 and 1985-86 school years when Parents instituted their unilateral actions of home tutoring and placement of Billy at Leland Hall. Furthermore, by the time the SAC found Marconi School to be the least restrictive placement for Billy in September 1984, Mashpee already had elevated this appeal to U.S. District Court for over six months since March 1984. Therefore, any SAC action in September 1984 would have been meaningless. Third, on December 18, 1984 Judge Zobel ruled against Parents' motion for a preliminary injunction placing Billy at Marconi School for failing to establish a likelihood of success on the merits. As of the date of the denial of their motion for a preliminary injunction, Parents had been providing Billy with home tutoring but had not yet placed him at Leland Hall. Thus, Parents' unilateral action placing Billy at Leland Hall subsequent to the U.S. District Court's denial of their motion for a preliminary injunction was not only at their own risk but was done with a clear signal from the Court that Parents were unlikely to prevail before the Court on the merits of their position. Fourth, Mashpee had never agreed to fund home tutoring or Leland Hall placements for Billy nor had any adjudicatory body - the BSEA, the SAC or the Court - ever heard any evidence about home tutoring or any Leland Hall placements, let alone rendered any type of decision or ruling that home tutoring or Leland Hall were appropriate educational placements for Billy or ordered Mashpee to fund such placements. Therefore, Parents had no basis for reliance that Mashpee was responsible for their unilateral and subsequent choice of placements pending resolution of the judicial appeal.

In summary, until August 25, 1986 when Judge Wolf issued his Decision and Order affirming the appropriateness of the Mashpee Intensive Language Program for Billy for the 1983-84 school year, the ILP as it existed under Billy's last agreed upon placement continued as his placement pending appeal for the 1984-85 and

*Since, as the U.S. District Court acknowledged, the BSEA specifically had made no findings as to the appropriateness or lack thereof of the Marconi placement, how the SAC, as an appellate body, was able to independently do so, even belatedly, is indeed a puzzelment.

1985-86 school years. As a result of the U.S. District Court's Decision validating the original BSEA Decision that a 502.4 IEP in Mashpee's ILP was the appropriate placement to address Billy's special education needs, the ILP continued as Billy's placement pending appeal for any dispute regarding years subsequent to the period covered by the BSEA and Court Decisions. Therefore, pursuant to Burlington School Committee v. Massachusetts Department of Education 105 S.Ct. 1996 at 2005, since the U.S. District Court has determined that the ILP placement proposed by Mashpee was appropriate to address Billy's special education needs so as to assure his maximum possible educational development within the least restrictive educational environment for the 1983-84 school year, Parents are barred from obtaining reimbursement for the 1984-85 and 1985-86 interim periods in which Billy's placement violated 20 U.S.C. 1415(e)(3).

III.

As stated above, the U.S. Court of Appeals for our Circuit in Burlington II under its Section III Succeeding Years - Jurisdiction and Proof ruled:

Despite the absence of any reviewable "findings and decision" by the state agency for subsequent years, the district court has authority with respect to those years under its power to grant appropriate relief incident to its determination concerning the contested IEP for the initial year, 1979-80. 736 F.2d at 795.

Burlington II further provided:

When the district court turns to formulating appropriate relief for the subsequent years, the losing party in the dispute over the 1979-80 IEP will have the burden of producing evidence and persuading the court of changed circumstances that render the district court's determination as to the initial year inappropriate for guiding its order of relief for subsequent years. The court will hear evidence regarding the subsequent years' appropriate placement from both parties prior to ordering "appropriate" relief per §1415(e)(2). 736 F.2d at 795.

In Section IV - Reimbursement, Burlington II ruled:

Because the Act envisions cooperatively discussed and negotiated IEPs and placements, whether parents made a specific proposal for a private placement and attempted in good faith to gain an agreement with the school system before moving the child may be taken into account as a factor in determining the amount of reimbursement. 736 F. 2d 773 at 799.

Burlington II summarized its discussion regarding reimbursement as follows:

We conclude this section by stating what we hope is by now obvious in situations where reimbursement is an issue; whether to order reimbursement, and at what amount, is a question determined by balancing the equities. Factors that should be taken into account include the parties compliance or non compliance with state and federal regulations pending review, the reasonableness of the parties' positions, and like matters. 736 F.2d at 801-802.

In the instant case the U.S. District Court, rather than exercising its jurisdiction to decide the issues regarding the subsequent 1984-85 and 1985-86 school years, remanded the case to the BSEA. Therefore, the BSEA in this case is analagous to the district court which was remanded the Burlington II case, in terms of analyzing the burden of proof, weighing various factors, balancing the equities, fashioning appropriate relief for the subsequent years of 1984-85 and 1985-86, and determining whether or not reimbursement should be ordered and if so, to what degree.

As stated in Section I of this Decision above, Mashpee violated its legal obligation under state and federal law to propose IEPs for Billy for the 1984-85 and 1985-86 school years and that is a factor which weighs heavily against Mashpee's position. However, virtually every other factor or consideration in terms of balancing the equities, based upon the evidence presented in this particular case, weighs heavily against Parents' position.

First, Parents did not follow the precepts of 20 U.S.C. 1415(e)(3) regarding Billy's placement pending appeal and their actions in their failure to do so and the attendant results have been discussed in Section II of this Decision above.

Second, subsequent to the original BSEA Decision, Parents failed or refused to grant Mashpee permission to re-evaluate Billy for purposes of developing a new and updated IEP on at least five separate occasions - 10/83 (S-64); 6/84 (S-52); 9/84 (S-50); 1/85 (S-44); and 5/85 (S-42) - prior to finally allowing Mashpee to evaluate Billy in the summer/fall of 1986 after he had been outside of the Mashpee Public Schools for 2 years and at Leland Hall for 1½ years. (See STATEMENT/HISTORY OF THE CASE above; testimony, Mr. D.). Three of these dates were prior to the 1984-85 school year and all five of these dates were prior to the commencement of the 1985-86 school year - the two years for which Parents now seek reimbursement.

Third, subsequent to the original BSEA Decision and the expiration of Mashpee's proposed 1983-84 IEP for Billy, Mashpee specifically offered on three separate occasions - 9/84 (S-50);

10/84 (S-49); and 1/85 (S-44) - to provide educational services to Billy but Parents' failed or refused to respond to Mashpee's offers. All three of these dates were prior to Parents' unilateral placement of Billy at Leland Hall. (See STATEMENT/HISTORY OF THE CASE; testimony, Mr. D.).

Fourth, when Parents unilaterally decided to 1) home tutor Billy; 2) place him at Leland Hall as a residential student; and 3) place him at Leland Hall as a day student; at various points in time during the 1984-85 and 1985-86 school years at issue, they never proposed these actions as options to Mashpee. Parents neither cooperatively discussed/negotiated with Mashpee nor consulted with Mashpee. In fact Parents never even informed Mashpee of their actions during the 1984-85 and 1985-86 school years despite correspondence from Mashpee. (See STATEMENT/HISTORY OF THE CASE above; testimony, Mr. D.). The only way Mashpee found out where Billy was occurred when Leland Hall requested Billy's educational records from Mashpee. (See S-43).

Fifth, from late March 1984 until July 1986 Parents ceased all communications with Mashpee. Despite Mashpee's repeated attempts to contact Parents, writing them to request their permission to evaluate Billy and update assessments so that Mashpee could write a new IEP, and writing them to offer educational services to Billy, Parents did not respond at all. The only communication during this time period was one letter from Parents' attorney in response to Mashpee's attorney's offer of educational services in which Parents' attorney replied that Parents would only discuss Billy's placement at Marconi School. (See STATEMENT/HISTORY OF THE CASE; S-48, 49).

Sixth, the record indicates that Parents had never allowed Mashpee to fully implement its total Intensive Language Program for Billy even after the original BSEA Decision or, for that matter, after Judge Wolf's Decision was rendered and Billy returned from Leland Hall to the Mashpee Public Schools. (See STATEMENT/HISTORY OF THE CASE above; testimony, Dr. Foley; Mr. D.).

The one major distinction between Burlington II and the instant case is that in Burlington II the parents had prevailed before the BSEA which had found Burlington's proposed program/placement for the student inappropriate to address his special educational needs and had found his parents' unilateral private placement at Carroll School to have been appropriate. Thus, when the Burlington II Court writes of having no Burlington IEP as a starting point for subsequent years, being faced with a mere hypothesis of what Burlington would have proposed in subsequent years, and the Town gaining an advantage by its failure to prepare IEPs during the subsequent years to the litigation, the Court was beginning from the premise that the IEP which had initiated the litigation in Burlington II had been adjudged inappropriate by the BSEA. With an inappropriate IEP to commence the litigation and no IEPs produced for subsequent

years, the Burlington II Court was, indeed, faced with no basis on which to determine whether Burlington had the capacity to promulgate an appropriate IEP for subsequent years. In such a situation, when the Court looked to subsequent years, the school would have clearly gained an advantage through its failure to produce IEPs for subsequent years. In the case before me, Mashpee gained no advantage by its failure to promulgate IEPs for subsequent years. The BSEA had already found Mashpee's IEP to be appropriate for Billy and had found Parents' position unwarranted. The U.S. District Court later concurred with the BSEA and found Mashpee's ILP placement appropriate to meet Billy's special education needs for the 1983-84 school year. This is the premise from which I am beginning. While Mashpee prepared no IEPs for the 1984-85 and 1985-86 school years, there was at least a firm foundation that Mashpee already had an Intensive Language Program that had been adjudicated by the BSEA to be appropriate to meet Billy's special education needs in the immediately preceding years to 1984-85 and 1985-86. Therefore, in this case, there was substantially more than a mere hypothesis of what Mashpee would have proposed - there was the solid starting point of a program already adjudged appropriate for Billy for the years immediately prior to the years currently at issue. By not promulgating subsequent IEPs, Mashpee actually disadvantaged itself. (See analysis in Section I of this Decision above). Further, given Mashpee's being denied by Parents the opportunity to perform updated assessments; given that Parents did not share with Mashpee any private evaluations that they had had performed subsequent to the original BSEA Decision until the late summer of 1986 (testimony, Mr. D.); and given the original BSEA Decision finding Mashpee's ILP appropriate; had Mashpee prepared IEPs for the 1984-85 and 1985-86 school years, the only possible placement that Mashpee could have proposed for those subsequent years would have been the ILP. Finally, any Parental argument that Mashpee should have proposed something different for the 1984-85 and 1985-86 school years would have been effectively foreclosed by their lack of cooperation in not permitting Mashpee to perform updated evaluations; their not sharing with Mashpee any of their own private, updated evaluations; their failure to respond to any Mashpee correspondence; and their failure to communicate with Mashpee.

Mr. D. testified that he did not know what the ILP was in Mashpee other than what he saw on the service delivery page of the IEP and that he was not sure what the ILP was. I conclude that Parents were clearly aware of what Mashpee's ILP was and the services it had offered to Billy, had offered and implemented for Billy, and could offer to Billy - Parents simply did not agree with Mashpee that it was the most appropriate placement for Billy. Billy had attended the ILP for approximately the last $\frac{1}{2}$ of his 1981-82 school year under his last accepted IEP. Mr. D. testified that Ms. Foley had explained the ILP to Parents. Although Parents caused various services and subjects provided through the ILP to be discontinued and/or changed at various

points in time, Billy continued to receive at least partial services under the ILP throughout the 1982-83 and 1983-84 school years. At the original BSEA hearing (#83-0252) ILP teacher Foley and ILP speech-language pathologist Rebello testified what services Billy would receive under the ILP and how the ILP would specifically address his special education needs. Mashpee's Exhibit #1 at the original BSEA hearing was a detailed written description of its ILP - what it was, what it was designed to do, how it was taught and the specific services provided. Mashpee's Exhibit #23 at the original BSEA hearing was Billy's proposed 1982-83 and 1983-84 schedules delineating what subjects and for what periods of time he would receive services within the ILP, the resource room and in regular education subjects and Ms. Foley specifically testified regarding the proposed 1983-84 schedule at the original BSEA hearing. I also note Mr. D.'s testimony that he had no reason to believe that Mashpee's ILP did not continue to exist during the 1984-85 and 1985-86 school years. (See P-3; S-57, 65, 71; S-35 footnote 11, pages 109-110; testimony Ms. Day; Dr. Foley; Mr. D.). I find testimony that Parents were unaware of the ILP or of the services it had provided to Billy and was capable of continuing to provide to Billy to be unsupportable.

Parents' rationale for not communicating with Mashpee nor responding to any Mashpee correspondence to them during this almost 2½ year period from March 1984 until July 1986 stemmed from a short telephone conversation between Mrs. D. and Mr. D'Amico, the interim special education director in Mashpee from December 1983 until September 1985 (S-60; testimony Ms. Day), which occurred in late March 1984. Mrs. D. testified that she had called Mr. D'Amico regarding placing Billy at Marconi School after the SAC reversal of the original BSEA Decision. Mrs. D. was unaware that Mashpee had appealed the matter to court at that time. Mrs. D. testified that Mr. D'Amico refused to discuss the Marconi placement because the case was in litigation and such communication should be between lawyers. Mr. D. testified that he understood that Mashpee did not want to do anything until its appeal was resolved. Mr. D. also testified that Mr. D'Amico never told Mrs. D. that he wouldn't provide services to Billy or evaluate Billy but that all that he recalls is that Mr. D'Amico said that he couldn't discuss the matter. When pressed, Mr. D. acknowledged that "the matter" could have related to Billy's placement at Marconi School. (See testimony, Mr. D.). From the point of that phone conversation, Parents did not communicate or correspond with Mashpee. Both Mr. and Mrs. D. testified that they had received all of the subsequent documents and correspondence from Mashpee but that Parents never responded to them. Mrs. D. had also written a note to Mr. D'Amico on March 22, 1984 insisting that Billy be immediately placed at Marconi School (S-56). On March 23, 1984 Mr. D'Amico wrote a letter in response (S-55) stating:

In response to your letter of March 22, 1984
requesting immediate placement of Billy at the
Marconi School, I must inform you, as I did

yesterday on the phone, that the Mashpee Public Schools has decided to appeal this SAC decision. The case, therefore, is still in litigation.

Mr. D'Amico then referred all further correspondence regarding the court appeal to his attorney and gave Parents the attorney's address. His closing paragraph concluded (S-55):

I must, in closing, say that I regret your decision not to pursue this issue with me, especially concerning the independent evaluation that we had previously discussed. Should you at any time feel that you would like this matter re-opened, please contact me at 477-1272. I still believe that together, we can resolve this issue towards the satisfaction of all concerned.

Based upon the limited testimony and documentation put forward on this point, I conclude that Mr. D'Amico's oral comments to Mrs. D. and letter to Mr. and Mrs. D. referred specifically to discussion regarding placement of Billy at Marconi School which was the issue precipitating the court appeal. I am unable to conclude that Mr. D'Amico meant to convey that Parents and Mashpee could not speak about anything concerning Billy's current education or issues regarding future IEPs/special education services for Billy. After all, in March 1984 Billy was still attending school in Mashpee and Mr. D'Amico would have had no knowledge regarding Parents' intentions for 1984-85 or 1985-86. Indeed, all of Mashpee's/Mr. D'Amico's future actions in their numerous written correspondence and communications to Parents seeking permission to evaluate Billy prior to preparing new IEPs, and in offering Billy educational services within Mashpee, support my conclusion. (See STATEMENT/HISTORY OF THE CASE above). I find Parents' position justifying their lack of communication to Mashpee for over 2½ years to be untenable.

Mr. D. testified on redirect that he also did not respond to any Mashpee correspondence subsequent to March 1984 because his attorney told him not to. On recross Mr. D. testified that he was unaware of any correspondence from his attorney to Mashpee's attorney or any representative of Mashpee that his attorney had advised him not to communicate with Mashpee. Mr. D. also testified that he had no reason to believe that Mashpee had any knowledge of his attorney's advise to him regarding communications with Mashpee. Assuming, arguendo, all of the above to be true, the least Parents should have done was to forward all of Mashpee's correspondence to them onto their attorney for an appropriate response. If Parents chose or were instructed not to respond to Mashpee directly, some type of response from their representative to Mashpee's repeated correspondence and attempts to make contact was certainly warranted. I do not find a total lack of response to all of

Mashpee's extensive correspondence to Parents for over 2½ years,* without any explanation, to be a tenable position. Either Parents or their attorney had the onus to respond, direct the correspondence elsewhere, or indicate why no response would be forthcoming.

Neither prior to nor during the 1984-85 and 1985-86 school years did Parents ever request Mashpee to convene a team meeting to develop an IEP for Billy or request that Mashpee provide any educational services to Billy. Similarly, neither prior to nor during the 1984-85 or 1985-86 school years did Parents ever request a BSEA hearing regarding Mashpee's failure to propose IEPs for Billy for the 1984-85 and 1985-86 school years. Mr. D. testified that he was unaware that he could ask Mashpee to convene a team meeting to write an IEP. Mr. D. later testified that during the 1984-85 and 1985-86 school years he was aware that at any time during that period he could demand educational services for Billy from Mashpee. Mr. D. also testified that he did not consider re-enrolling Billy in Mashpee when his motion for a preliminary injunction was denied in December 1984, prior to his enrolling Billy at Leland Hall. On July 10, 1986, after the 1984-85 and 1985-86 school years had expired but while the court appeal was still in litigation since Judge Wolf's Decision was not handed down until August 25, 1986, Mr. D. requested a hearing before the BSEA to get Mashpee to provide Billy special education services (S-40). Mr. D. testified that he requested a hearing then because he wanted Mashpee to write an IEP over the summer of 1986; and that the hearing was initiated by Parents but not litigated to a conclusion because his only purpose was to get Mashpee to write an IEP for Billy's 8th grade year, 1986-87.

Based upon the totality of evidence presented, I conclude that Mr. D. was aware that he could have requested a team meeting, an IEP and educational services from Mashpee, or requested a BSEA hearing based upon Mashpee's failure to propose IEPs at any time during the 1984-85 or 1985-86 school years. I conclude that Mr. D. chose to take no action during the 1984-85 and 1985-86 school years to respond to Mashpee's correspondence; to communicate with Mashpee; to request Mashpee to provide educational services, convene a team meeting or propose an IEP; or to request a hearing before the BSEA due to Mashpee's failure to propose IEPs for the 1984-85 and 1985-86 school years; because he had made a reasoned judgment that Mashpee would have proposed IEPs continuing Billy's placement in the ILP and that the BSEA would have likely ratified Mashpee's placement, given the original BSEA Decision combined with the fact that Parents had refused consent to any updated evaluations that might have altered that determination. I conclude that Parents did not intend for Billy to be educated in Mashpee's ILP under any

*Save for the one exchange of letters between counsel in October 1984 (S-48, 49).

circumstances during the 1984-85 and 1985-86 school years. Therefore, team meetings and promulgation of IEPs for the 1984-85 and 1985-86 school years, while satisfying Burlington II's design for years subsequent to the IEP appealed to court, would effectively have been meaningless exercises in futility and clearly not Burlington II's or the IDEA's envisionment of cooperatively discussed and negotiated IEPs and placements, based upon the evidence presented in the instant case. I note that Mr. D. had no qualms about interferring with the ongoing court litigation in this case which had not yet resulted in a decision, nor any qualms in dealing or communicating with Mashpee when he requested a hearing on July 10, 1986 because Mashpee had not proposed an IEP for Billy since the 1983-84 school year. (See S-39, 40). I conclude that when Mr. D. was again ready to consider the possibility of Billy's placement within the Mashpee Public Schools, he had no difficulty making his voice heard - ongoing court litigation and/or attorney's advice notwithstanding.

I conclude that the special education services available to Billy within the ILP were appropriate to address his special education needs so as to assure his maximum possible educational development in the least restrictive educational environment during the 1984-85 and 1985-86 school years. Ms. Day, director of special education for Mashpee, described Mashpee's Intensive Language Program - the population of students it is designed to serve, the intensity of the program, the techniques and methodologies employed and the student to staff ratios - as it existed during the 1984-85 and 1985-86 school years. Ms. Foley, the original teacher of the ILP, had left Mashpee prior to the commencement of the 1983-84 school year.* She was replaced by Ms. Robinson who was Billy's ILP teacher during the 1983-84 school year, the last year he attended school in Mashpee prior to his removal. Ms. Robinson would also have been Billy's ILP teacher if he had attended the ILP during the 1984-85 and 1985-86 school years. Ms. Robinson was certified as a teacher of the speech, language and hearing handicapped and licensed as a speech-language pathologist - the same certification and licensure Ms. Foley then held. For the 1984-85 school year the speech-language pathologist for the ILP was Ms. Rebello who had been Billy's speech-language pathologist during the 1981-82, 1982-83 and 1983-84 school years during those periods in which Parents had allowed Mashpee to provide Billy with speech-language therapy. Ms. Rebello was certified as a teacher of the speech, language and hearing handicapped and was a licensed speech-language pathologist. During the 1985-86 school year the speech-language pathologist for the ILP was Ms. Hendree who held the same certification and licensure as Ms. Rebello. The ILP was in existence during the 1984-85 and 1985-86 school years in the

*As Judge Wolf was well aware when he reached his Decision regarding the 1983-84 school year - See S-35, footnote 27, pages 141-142.



same form as previous years. (See testimony, Ms. Day).

Dr. Foley testified that she was the creator and original teacher of Mashpee's ILP from 1978 to 1983. She taught Billy in the ILP, as permitted by Parents (see P-3; S-57), during the 1981-82 school year from March 1982 through June 1982 and also during the 1982-83 school year. Dr. Foley also described the purpose of the ILP, the students it was designed to serve, the type of program the ILP was and how it was taught, her duties and responsibilities as teacher of the program and the interactions between the teacher of the ILP and speech-language pathologist of the ILP. Although Dr. Foley left as teacher of the ILP prior to the 1983-84 school year, she consulted with the new teacher, Ms. Robinson, to review all students and assure consistency with the new teacher. There were three full day consultations in September 1983. Mashpee also retained Dr. Foley to evaluate Billy upon his return from Leland Hall to Mashpee in 1986. Dr. Foley tested Billy over two days (September 17-18, 1986) for 1½ to 2 hours each day to assure there would be no fatigue factor to compromise his performance. (See S-25). During the time she was not evaluating Billy on those two days, Dr. Foley observed the ILP and consulted with its teacher, still Ms. Robinson. Based upon her knowledge of the ILP as its originator and teacher from 1978 through June 1983, her consultations to the ILP in September 1983, and her observations/consultations to the ILP in September 1986, Dr. Foley found the focus of the ILP to be the same i.e., a language based program to provide intensive remediation to the student's primary language disorder and to address the student's reading, writing and written language problems throughout the course of the program in an integrated way, utilizing content areas as you are addressing the language skills that are targeted. Dr. Foley testified that she perceived no substantial changes to the ILP from her 1983 consultation to her 1986 observations - that the program was essentially the same. Those changes Dr. Foley did observe - additions to the ILP such as new materials and access to the computer lab for word processing to aid students with writing and spelling skills - she found to be very beneficial. Based upon her experience teaching the ILP from 1978-1983, her consultations/observations of the ILP in September 1983 and September 1986, her experience teaching Billy in the ILP for 1½ years from March 1982 through June 1983, and her testing of Billy in September 1986, Dr. Foley opined that the ILP was an appropriate placement for Billy. (See testimony, Dr. Foley).

But for the mechanics of convening team meetings and preparing IEPs based upon outdated assessments, IEPs which Parents would not have allowed to be implemented in any event, all parties knew exactly what Mashpee would have proposed for the 1984-85 and 1985-86 school years - 502.4 prototype IEPs placing Billy within its Intensive Language Program - the type of program previously found appropriate by the BSEA. Had Mashpee written such IEPs, based upon the totality of evidence presented, I have no doubt that I would have found such IEPs appropriate to address Billy's special education needs so as to assure his maximum

possible educational development within the least restrictive educational environment.

Based upon the totality of evidence presented; and in applying the criteria and rationale delineated in Burlington II in terms of weighing various factors and balancing the equities given the specific and unique circumstances of this particular case as delineated in Section III of this Decision; I conclude that Mashpee's failure to develop IEPs for the 1984-85 and 1985-86 school years, while a serious omission, is clearly outweighed by the actions taken by Parents. The aggregate combination of Parental actions detailed above, whether deliberate or unintentional, created a pattern of obstruction which frustrated and effectively vitiated a fundamental intent and purpose of federal and state special education law to foster parental/school cooperation and good faith in working together toward a common goal. Given that Mashpee had a program in existence that was capable of comprehensively addressing Billy's special education needs during the 1984-85 and 1985-86 school years; given Billy's history in that very program and the original BSEA Decision finding such program appropriate; given Parents' knowledge that such program was available to Billy at any time during the two year period at issue; given Parents' actions detailed above; and given an impartial balancing of the equities; I conclude that reimbursement to Parents for their unilateral placements of Billy is not warranted in this case.

IV.

Pursuant to Burlington II 736 F.2d. 773 at 795 cited above, when formulating appropriate relief for subsequent years the losing party in the original action has the burden of producing evidence and persuasion of changed circumstances which would render the court's determination as to the initial year inappropriate for guiding any order of relief for subsequent years. In the instant case, given the U.S. District Court's Decision that Mashpee's Intensive Language Program was appropriate for Billy for the 1983-84 school year, Parents have the burden of producing evidence and persuasion of changed circumstances that would render Judge's Wolf's determination as to the 1983-84 school year inappropriate for the 1984-85 and 1985-86 school years. As detailed in Section III of this Decision above, I find no evidence that Mashpee's ILP had been altered during the 1984-85 and 1985-86 school years which would render Judge Wolf's determination for the 1983-84 school year invalid or inappropriate for the 1984-85 or 1985-86 school years. I further find no evidence that Billy's special education needs had changed or worsened or that such needs necessitated home tutoring, private residential school, or private day school placements. I deal with each Parental placement in turn.

603 CMR 28.502.7 governs home or hospital programs. There are two types of home or hospital placements under this prototype, Type A and Type B. Both types require that the

child's physician rather than an IEP must specify the home or hospital placement and both types are triggered by the physician's determination that the child must remain at home or in the hospital or both for specified periods in order not to endanger the health or safety of that child or others. Both types also require that a teacher provide the program, with its content to be the same as the content of the program the child would be in if he were in school, and with said program reduced only if the child's physician states that a lesser curriculum would be in the child's best interests. Parents' home tutoring met none of the above requirements. There was no evidence presented that Billy required such a home program based upon the advice or recommendation of a physician or that he required a lesser program than if he were in school. Mr. D. testified that a tutor (Ms. Hutchinson), who was certified in the Orton-Gillingham method, tutored Billy several days per week for a total of 4-5 hours per week and that Mr. D. taught Billy some math every day. This constituted Billy's entire educational program from September 1984 to late January 1985. Mr. D. testified that the tutor was not a certified special education teacher in Massachusetts, that he did not think that she was certified to teach anywhere, and that he was unsure if she even had a degree. No reports nor any evidence was produced regarding what was covered during this home tutoring. Based upon this evidence or lack thereof, and the criteria necessary for a home placement, I find no justification to order reimbursement for Parents' unilateral action of providing home tutoring for Billy during the first semester of the 1984-85 school year.

Private residential school programs are provided by LEAs only when the severity of the child's special education needs is such that he requires the intensity of educational services that can only be provided on a residential basis - in school, before school, after school, into the evening and sometimes on a 24 hour basis. A residential placement is the most restrictive placement that can be ordered under state and federal special education law. Parents have presented no evidence whatsoever that Billy's special education needs required the restrictiveness of a residential educational placement from January 1985 through June 1985. Indeed, I note Mr. D.'s testimony that he switched Billy to a day placement for the 1985-86 school year because Billy was too young to be living away from home; that Billy finished out the January-June 1985 semester but Parents felt sorry for him; that Billy expressed a desire to be able to come home nights; and that Mr. D. believed tht Billy got more out of Leland Hall in 1985-86 by being able to sleep in his own bed. I find no justification to order reimbursement for Parents' unilateral residential placement of Billy during the second semester of the 1984-85 school year.

Private day school programs are provided by LEAs only when the nature or severity of the special need is such that education in a less restrictive prototype with the use of supplementary aids and services cannot be achieved satisfactorily. (See 603 CMR

28.502.5). The original BSEA Decision, the U.S. District Court Decision, and now the current BSEA Decision have all determined that Mashpee's 502.4 Intensive Language Program could appropriately address Billy's special education needs so as to assure his maximum possible educational development and could do so in a less restrictive educational environment than a private day school setting. Parents have presented no evidence regarding Leland Hall itself or Billy's educational program there other than his Leland Hall IEPs and the fact that Leland Hall was then approved as a private day (502.5) and residential (502.6) placement. I find insufficient evidence to demonstrate that Billy benefitted more from his Leland Hall placement than he would have from a Mashpee 502.4 ILP placement, nor have Parents presented any changed circumstances which would warrant a different conclusion. Parents' expert, Dr. Maslow, testified that Billy had progressed at Leland Hall based upon Ms. Mack's testing (P-18d-g) which Parents had had done privately. However, both the original BSEA Decision and the U.S. District Court Decision found that Billy had progressed in his Mashpee placement based upon the testimony of Dr. Foley, Mr. Konigsburg, and even the evaluations then performed by Parents' private evaluator, Ms. Mack. (See P-3; P-18a-b; S-57; S-35 pages 115-117, including footnote 16 Page 117; 119-120; 137, including footnote 23 page 137-138). Further, Dr. Maslow's testimony was based purely on a review of Billy's records. Dr. Maslow has never evaluated or taught Billy. She did not know the basis of Billy's instruction when he was at either Mashpee or Leland Hall. She had never observed Billy at Leland Hall or spoken with his Leland Hall teachers nor did she know their certifications. Dr. Maslow testified that she did not know what instruction Billy received and was not familiar with his Leland Hall program. She stated that she was familiar with Leland Hall and had observed it a number of years ago "sometime in the 1980's" when the program was put together for people with reading disabilities. Dr. Maslow testified that she had never observed any Mashpee programs nor spoken to Mashpee personnel about Billy. Therefore, she had no basis for comparison of the Mashpee and Leland Hall programs. I also note that Dr. Maslow twice testified that it was her understanding that Billy attended school in Mashpee until his placement at Leland Hall in January 1985. She apparently was unaware that Billy had been home tutored for an entire semester immediately preceeding his Leland Hall placement.

In contrast, as described in Section III of this Decision, Dr. Foley had intimate knowledge of the ILP and had the experience of teaching and testing Billy, observing him function on a daily basis and progress. Dr. Foley also observed Leland Hall in October 1986 for $\frac{1}{2}$ day, viewing the classes Billy would have been in if he had continued at Leland Hall. Included in her observation was a full class period of reading with the same teacher Billy had had for reading and language during his final year at Leland Hall. Ms. O'Meara, Director of Admissions at Leland Hall, informed Dr. Foley that the program Dr. Foley observed was essentially the same program and methodology which

Billy had received the prior years when he was a student at Leland Hall. Based upon her observation, Dr. Foley did not perceive Leland Hall to be a language based program and did not see work on primary language disorders, attention to language in context and in developing meaning, or appropriate teaching strategies. (See testimony, Dr. Foley). Given Dr. Foley's experience teaching Billy, testing Billy, knowledge of the ILP, and observation at Leland Hall; in comparison to Dr. Maslow's exclusive records review with no direct knowledge of Billy nor his ILP or Leland Hall programs; I must give substantially more weight to the testimony of Dr. Foley.

Several other matters must be addressed which favor Mashpee's ILP over Leland Hall. The ILP utilized the Stevenson method while Leland Hall utilized the Orton-Gillingham method. (See testimony of Dr. Foley; testimony of Ms. O'Meara at BSEA #86-1056; P-3; S-57). The original BSEA Decision and the U.S. District Court Decision, weighing the testimony of Dr. Foley, Ms. Mack and Dr. Tisdell, both found that the Stevenson method more appropriately addressed Billy's special education needs. (P-3; S-57; S-35 pages 136-140). Further, federal and state special education law mandate not only that a student's special education needs be appropriately addressed/appropriately addressed so as to assure maximum possible educational development, respectively, but also that this be done in the least restrictive educational environment possible given the student's disabilities and level of dysfunction. A special education student must be mainstreamed, as much as possible, into public school regular education classes and must be educated as close to the public school regular education classes as possible. In Mashpee's 502.4 ILP Billy could have been mainstreamed for all non-academic subjects and activities with regular education students in his own community public school. At Leland Hall Billy was educated at all times with other special needs students from diverse locations. (See also S-35 pages 132-133; 135-136; 140). Finally, Billy's private day school placement at Leland Hall required him to commute well over 100 miles per day. I take administrative notice of the Milo Mileage Guide which puts the distance between Mashpee and Norfolk (Leland Hall's location) at 68 miles which equals 136 miles per day round trip. Given a maximum legal speed limit for the entire trip and good road conditions, Billy's commute was in excess of one hour one way and in excess of two hours round trip each day, thereby reducing his time for any additional study or extracurricular activities by approximately 2 hours daily. (See S-35 page 140).

Dr. Maslow, based upon her review of the records, testified that given the nature of Billy's disability and deficit, remediation would take approximately three years; that you need a program in place for a period of time before changing it, in order to give the approach an opportunity, to determine whether or not it has effectively instituted any change in the disability; and that when you have a case as severe as Billy's you have to consider not changing a program in under three

years. Dr. Maslow also testified that Billy's needs should be addressed in all educational settings in a coordinated and consistent basis across the academic day; that all his teachers should be trained in teaching children with language deficits; that she would want to see a level of training or understanding like Dr. Foley had of how to address these needs; that instruction of language should be done through content area materials; and that for Billy to be in regular education classes with teachers skilled in teaching the coursework but not in language disabilities would not be an appropriate placement for Billy because, given his disabilities, this would not be remedial and would be counterproductive. (See testimony, Dr. Maslow).

The original BSEA Decision, specifically affirmed by the U.S. District Court, concluded that Parents' decision to remove Billy from key special education classes and place him in mainstream regular education subjects such as math and science, despite Mashpee's objection, hindered Billy's progress; thus the full potential of the ILP could not be predicted by Billy's past performance. (See P-3; S-57; S-35 page 139). Parents' refusal to accept a 502.4 IEP placing Billy in the ILP for all of his academic subjects and their removal of Billy from speech-language therapy and from the ILP in favor of mainstream regular education classes occurred throughout Billy's placement in the ILP during March-June 1982; 1982-83; 1983-84 and 1986-87. As stated previously in this Decision, Parents had never allowed Mashpee to fully implement its ILP for Billy. (See STATEMENT/HISTORY OF THE CASE above; P-3; S-57; S-35 pages 109-110, including footnote 12 on pages 109-110; testimony, Dr. Foley; Ms. Day). At the conclusion of the 1983-84 school year when Parents totally removed Billy from Mashpee and the limited ILP services they previously had allowed to eventually place him at Leland Hall, Billy had received only partial services from the ILP and had received these partial services for less than three years. I find that Dr. Maslow's testimony in the preceeding paragraph actually supports Mashpee's consistent position that Billy should have received all of his academic subjects within the ILP special education setting with trained special education teachers and the instruction of language done through content area materials in a coordinated manner; and that Billy should not have been mainstreamed into regular education courses for academic subjects.

In summary, pursuant to Burlington II, Parents have failed to establish any changed circumstances in Mashpee's Intensive Language Program or in Billy's special education needs which would render the U.S. District Court's determination as to the 1983-84 school year inappropriate for guiding any order of relief for the 1984-85 or 1985-86 school years. I find no basis to conclude that Billy required the restrictiveness of home tutoring, private residential placement at Leland Hal or private day school placement at Leland Hall. I also conclude that Parents have presented insufficient evidence that Leland Hall was appropriate to address Billy's special education needs.

V.

20 U.S.C. 1415(e)(4) grants the federal courts the sole discretion to determine whether or not attorney's fees are warranted and, if so, to determine the amount of the award. Any award of attorney's fees is beyond the jurisdiction of the BSEA.

ORDER

Mashpee is not responsible for reimbursement to Parents for any of their unilateral placements of Billy during the 1984-85 or 1985-86 school years.

By The Hearing Officer:

Raymond Oliver
Raymond Oliver

Dated: March 2, 1992

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: CHRISTOPHER K.

BSEA #89-1843

COMPLIANCE ORDERS

A status conference was held on May 14, 1992, in the above-entitled matter. The purpose of the conference was to permit the parties to discuss whether and how they had fulfilled their respective obligations as set forth in the Decision of August 12, 1991, and the Implementation Orders of December 4, 1991. The representations of counsel for the Department of Education, speaking also for the Department of Public Health, and of counsel for the student and for North Middlesex Regional School District, made it clear that there has been less than adequate compliance with the Bureau's prior orders in this matter. What compliance there has been, has been grudging and haphazard. As a result, Christopher continues to lack the appropriate educational program to which he is entitled. Nine months have elapsed since the Bureau's original decision. No stay of enforcement has been issued by the U.S. District Court. Therefore full compliance with the Bureau's orders is required. It appearing that the parties have been unable to identify and allocate their responsibilities without guidance from a neutral observer, heightened scrutiny of the parties' actions pursuant to the Bureau's Orders, as well regular reports to the Bureau, are warranted. I find that additional implementation orders are proper and necessary in order to secure an appropriate educational program for Christopher. The following orders are supplemental to those set out on August 12th and December 4th, 1991. Compliance with them is the minimum required to meet the parties' obligations under the IDEA and the Rehabilitation Act.

1. First, the Department of Education shall appoint a monitor to supervise Christopher's entire educational program. The name and position of the monitor shall be submitted to the Bureau and the parties no later than May 29, 1992. The monitor shall assume the role typically assumed by the special education liaison selected by a local education authority. The monitor shall be responsible for oversight of Christopher's program, in all locations. Specifically, the monitor's duties will include, but not be limited, to the following:

a. maintaining communication among all persons with an interest in Christopher's education;

b. supervising the provision of services to Christopher, by noting the frequency, duration and content of those services on a daily basis;

c. maintaining attendance and transportation records;

d. securing the services and/or substitute services of any and all providers of required educational, transportation or health-related personnel or equipment;

e. maintaining continuity of service provision and goals among Christopher's current place of residence, prospective place of residence, and the day educational program;

f. advocating on Christopher's behalf for services and programs consistent with the Bureau's Decision, including attendance at TEAM meetings, facilitating information sharing among interested parties, and problem-solving when unavoidable delays or difficulties arise;

g. submitting weekly reports on Christopher's program to the Hearing Officer and other parties to this appeal. Such reports shall contain, at a minimum, a record of Christopher's attendance and the reason for any absences or shortened days; a description of services received; a record of any difficulties in the delivery of services along with a record of the monitor's efforts to resolve the difficulties; and

h. any and all other responsibilities necessary to secure full implementation of the Bureau's Decision with respect to Christopher's day-to-day educational program.

In the event the Department of Education fails to appoint a monitor, or the monitor fails to perform the necessary duties, the Bureau will select an independent monitor.

2. Second, the Department of Education shall submit documentary evidence of its efforts to secure financial reimbursement to North Middlesex Regional School District and the Tewksbury Public Schools consistent with the Bureau Decision. The documents, to be submitted no later than June 5, 1992, shall include the name and position of the person to whom a request for reimbursement was submitted, the name and position of the person requesting the reimbursement, the amount and the date of the request.

3. Third, to assess the extent of the Commonwealth's compliance with its own proposed Section 504 Compliance Plan, the Department of Public Health/Department of Education shall submit bi-weekly reports, due initially no later than June 5, 1992, tracking the appropriation process set out therein. The report shall include,

at a minimum, the names and positions of each person advocating on behalf of, or receiving/considering the appropriation requests, as well as the dates of each contact.

4. The parties shall attend monthly status conferences to assess compliance with the Bureau's Decision and the subsequent Implementation Orders. The next status conference will be held on June 10, 1992, at 2:00 p.m.

By the Hearing Officer

Lindsay Byrne
Lindsay Byrne

Dated: June 10, 1992

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: MICHAEL H. AND WINCHESTER PUBLIC SCHOOLS BSEA #90-1828

DECISION ON POST-HEARING MOTIONS

This matter comes before the Bureau on the Parents' Motion for a Finding of Non-Compliance pursuant to 603 CMR §28.00, §411.0, and the School's Opposition thereto. A decision in this matter was issued by the Bureau on February 6, 1991. The decision required Winchester to:

1. Train all Michael's service providers, including the school nurse, in the observation, monitoring, intervention and recording of Michael's seizure activity;
2. Provide for weekly consultation between school personnel and Michael's medical management team;
3. Develop an individualized behavioral plan, based on Michael's learning style and goals, to be implemented in all settings;
4. Train all Michael's service providers, and his parents, in the implementation and recording of the behavioral program;
5. Assign an instructional aide to the Lynch classroom, so that the teacher-student ratio does not exceed 1:5;
6. Provide for individual speech and language therapy;
7. Provide for individual presentation of new material.

Winchester filed a timely appeal and request for a stay of the Bureau's order in the United States District Court, where it is currently pending as CA No. 91-11165 WF. Winchester held a Team meeting on May 2, 1991, to discuss the modifications to the student's 1990-1991, required by the Bureau's decision. The parents declined to attend the Team meeting. Winchester developed an amendment to the plan at issue in the Bureau hearing at the Team meeting, and sent it to the parent's attorney and to the hearing officer. The Bureau received the proposed amendment on May 22, 1991. On May 24, 1991, the parent's attorney filed a Request for a Finding of Non-Compliance with the Hearing Officer. On May 30, 1991, the school offered an additional amendment to the student's plan, which reflected an omission of a service on the original amendment due to a clerical error. The school then filed an Opposition to the Parents' Motion for Non-Compliance on June 3, 1991. The parties waived oral argument on



these motions.

My review of the amendments offered by the school to the parents on May 30, 1991, reveals that the school carefully and thoughtfully modified the original plan to remedy the deficiencies noted in the Bureau decision. The amendments, when read together with the original plan, provide for all the critical services identified as necessary for Michael's maximum educational benefit by various evaluators and service providers. The modified plan contains all the required modifications set forth in the Bureau's original decision. (See list above) Thus the school, as of May 30, 1991, has complied with the February 6, 1991, Bureau decision.

Lindsay Byrne
Lindsay Byrne (KRA)
Hearing Officer

Dated: July 3, 1991

4/29/92

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: JONATHAN G.

BSEA #91-0921

DECISION

This decision is issued pursuant to M.G.L. c. 71B, 30A and 15, 20 U.S.C. 1401-1461, 29 U.S.C. 794, and the Regulations promulgated under those statutes. A hearing in the above-entitled matter took place on October 30, 1991, and March 5, 1992, at the Administrative Offices of the Framingham Public Schools in Framingham, MA. The issues to be decided at this hearing did not concern any current educational services for Jonathan, and thus he was not prejudiced by the lengthy, though unavoidable, period between hearing dates. Those present for all, or parts, of the proceeding were:

Mr. and Mrs. G.	Parents
William Rothney	Psychiatrist
Rhonda Taft-Farrell	Director of Special Education,
Framingham	Public Schools
Susan Keeney	Team Evaluation Coordinator, Framingham
Betsy McKeon	Team Coordinator, Framingham
Mary O'Brien	Social Worker, Framingham
Donald Freedman	Attorney for Parents
Philip Benjamin	Attorney for Framingham
Lindsay Byrne	Hearing Officer, BSEA

The official record of the hearing consists of documents submitted by the Parents marked P-1 through P-15, exhibits introduced by the school labelled S-1 through S-2g, and approximately 9 hours of recorded oral testimony. Both parties submitted written closing arguments by April 1, 1992, and the record closed on that date.

ISSUE

Whether parents are entitled to retroactive reimbursement of monies expended for counseling services provided to the student and to the parents by a psychiatrist and a social worker not associated with the Framingham Public Schools over the course of the 1989-1990 and 1990-1991 school years?

PARENTS' POSITION

Jon is a severely emotionally needy youngster who requires, intensive, frequent, consistent psychotherapy as an adjunct to a specially designed learning program in order for him to participate meaningfully in his education. In addition the

parents' therapy, aimed at helping them develop the understanding and skills necessary to deal effectively with Jon's complex behavioral and emotional needs, requires similar intensity and a high degree of coordination with Jon's therapist. Only such an integrated therapy constellation permits Jon to function in an educational setting less restrictive than a therapeutic residential school. This type of intervention was not offered by or available at Framingham Public Schools. Framingham acknowledged the need for outside services in the 1989-1990 IEP, but failed to provide them. The refusal to provide outside therapeutic services continued through the course of the 1990-1991 school year when Jon attended a private day school that did not offer on-site counseling.

SCHOOL'S POSITION

The school recognizes that Jon has significant emotional needs. It offered him individual counseling at the school twice a week, and group counseling once a week, in addition to placement in a substantially separate therapeutic class designed for students with emotional and behavioral difficulties. Parents never formally requested payment for additional outside services. Nor was there any support in the evaluations or Jon's in-school behavior or progress for the intense level of counseling services secured by the parents. Parents consistently refused to permit Jon to be evaluated by the school, and did not coordinate the outside psychological treatment with the services provided in school. Furthermore, the parents unilaterally placed Jon in a private school designed for students with learning difficulties that offered no counseling or therapeutic support.

SUMMARY OF THE EVIDENCE

1. Jonathan is a ten year old boy of at least average intelligence with a history of significant emotional concerns and some weaknesses in specific learning skills such as attention, concentration, and auditory memory. In the fall of 1988, Jon's second grade teacher requested a special education evaluation after the parents raised concerns about Jon's peer relations. (S-24) The parents chose instead to pursue an outside evaluation at New England Medical Center. (Mrs. G., Taft-Farrell, S-27) That evaluation team, headed by Dr. Homer Reed, met in a late April, 1989. They found Jon to be a bright boy who did not need special education services to improve his academic skills which were at least commensurate with his grade placement. Nonetheless, the NEMC Team recommended a specialized educational environment which could address Jon's emotional and social needs through individual and group therapy. (S-5; P-4, 5)

2. The Framingham TEAM met on June 1, 1989, and proposed that Jon attend a substantially separate class designed for students with emotional difficulties for his third grade year. In

addition the TEAM proposed that Jon receive counseling in school three times a week, twice individually and once in a small group. (S-1, P-7, 12). The IEP noted that Jon and his family were receiving additional therapies at the family's expense.

The parents returned the 502.4 IEP on September 19, 1989. Mrs. G. signed the plan, but did not indicate whether the plan was accepted or rejected. She noted "additional white-out" on page 3 of 6. In an accompanying letter, Mrs G. wrote that the phrase "at parent's expense" referring to additional therapies "is irrelevant to [Jon's] educational plan." (S-1, P-7, 12; P-17; Mrs. G.)

3. Jon began individual therapy with Dr. William Rothney, a psychiatrist recommended by Dr. Reed of the New England Medical Center, in October, 1989. Dr. Rothney testified at the hearing that he saw Jon twice a week, sometimes three times a week, for sixty minute sessions of individual psychotherapy. Dr. Rothney saw each of the parents weekly for treatment of longstanding concerns that pre-date Jon's birth¹. In addition, his associate Connie Rohrbaugh, a social worker, saw the parents twice a week. Once a month, the parents, Ms. Rohrbaugh and Dr. Rothney met together to discuss treatment issues. This level of intervention has continued through the time of the hearing. Dr. Rothney estimated that Jon's treatment would require a minimum of five more years.

Dr. Rothney testified that neither he nor Ms. Rohrbaugh performed any evaluations or testing with respect to Jonathan's treatment. He stated that he kept no notes or logs of his encounters with Jonathan. Dr. Rothney had no contact with the school between October, 1989, and June, 1991. He did not observe Jonathan in any setting other than his office. Dr. Rothney developed no progress reports. All Dr. Rothney's information came from the parents. He wrote three letters at their request, "to use in any manner they saw fit." (See P-6) When pressed for a diagnosis around which Jonathan's treatment centered, Dr. Rothney explained that he saw Jonathan fitting into the category of "Pervasive Developmental Delay" though he could not explain when or how Jonathan exhibited atypical development. (Rothney)

4. Mary O'Brien, Framingham's school social worker, began seeing Jonathan individually twice a week in October, 1989. In addition she conducted a weekly group therapy with all the students in Jonathan's 502.4 class. Ms. O'Brien also met with Jonathan's mother weekly to apprise her of the course of therapy and to make suggestions for intervention. The focus of Ms. O'Brien's work was Jonathan's school functioning, particularly

¹Parents are not seeking reimbursement for their individual sessions with Dr. Rothney.

improving his self-esteem, impulsivity and peer relations. Though she tried to contact Dr. Rothney and Ms. Rohrbaugh to coordinate Jonathan's treatment, she was unsuccessful. Mrs. O'Brien prepared weekly progress reports on her encounters with Jonathan. (S-23) The reports were sent home along with reports by the 502.4 teacher and the third grade mainstream teacher. (Taft-Farrell, Mrs. G.).

In December, 1989, it became clear that Jonathan did not enjoy the group therapy. At the same time the parents requested an increase in Jonathan's mainstream contact. Therefore the group session was eliminated in favor of more integration. This change was reflected in an IEP amendment produced in March, 1990. (P-14, S-2; Mrs. G., O'Brien, Taft-Farrell.)

5. The IEP produced as a result of the March 20, 1990, TEAM meeting called for Jonathan's continued placement in the 502.4 class he attended throughout the 1989-1990 school year. The parent returned the IEP on June 1, 1990, postponing a decision pending the results of an independent evaluation. (S-2, P-14) On June 4, 1990, the parents withdrew their acceptance of the 1989-1990 502.4 IEP under which Jonathan had been provided special education services through the course of the school year. (S-1c)

6. In May, 1990, Marsha Chaskelson conducted a multidisciplinary evaluation of Jonathan. (P-2, S-6) The report, prepared on May 15, 1990, found that Jonathan had made significant emotional progress over the course of the school year and no longer needed placement in a setting designed primarily for students with emotional difficulties. Dr. Chaskelson recommended that Jonathan be placed in a self-contained learning situation with bright, learning disabled children. She further recommended that he be involved in an Attention Deficit Disorder peer support therapy group.

7. The TEAM met again on May 27, 1990, to consider the independent evaluation results. The TEAM proposed a 502.4 IEP for the 1990-1991 year continuing the counseling services that Jonathan had received for this third grade year, but changing his substantially separate classroom to one designed for students with learning and organizational difficulties. (S-3) Parents, through their attorney, rejected the proposed plan and requested placement at a private day school designed for students with learning disabilities and with no primary emotional concerns. (See correspondence S-10 through S-22)

8. The parents unilaterally placed Jonathan at the Clearway School, a Chapter 766 approved day school for students with significant learning disabilities. The Clearway School has no counseling services. It does not offer a therapeutic environment. (Mrs. G.) Jonathan continued his treatment with Dr. Rothney during the 1990-1991 school year as he attended the

Clearway School. Dr. Rothney had no contact with the Clearway School or the Framingham Public Schools during this time.

(Rothney) Jonathan also attended a bimonthly Attention Deficit Disorder peer support group conducted by Dr. Chaskelson during the 1990-1991 school year. (Mrs. G., P-9) Jonathan made an excellent adjustment to the new school, performed well in all classes, and built positive relations with peers and adults. (S-7, 8, 9)

9. In the spring of 1991 the parties reached a partial settlement agreement through which Framingham agreed to develop an IEP calling for Jonathan's placement at the Clearway School for the 1990-1991 school year and to provide transportation, including reimbursement to the parents for any monies spent on these items. The parents, in addition, requested that Framingham fund the costs of the therapy provided throughout the 1989-1990 and 1990-1991 school years by: 1) Dr. Rothney to Jonathan and to his parents in conjunction with Ms. Rohrbaugh; 2) Ms. Rohrbaugh to Jonathan's parents; and 3) Dr. Chaskelson in Jonathan's ADD support group. Ms. Taft-Farrell testified that, though Jonathan's TEAM had met formally with his parents nine times in the development and implementation of the 1989-1990 IEP, in addition to innumerable phone calls and informal contacts, the parents had never requested that Framingham pay for the services of an outside psychiatrist. Framingham disputed the need for the type and intensity of the counseling services provided by Rothney and Rohrbaugh to Jonathan and his parents. Thus the issue of fiscal responsibility for outside counseling services provided during the 1989-1990 and the 1990-1991 school years was reserved for the BSEA hearing. Framingham requested that the BSEA order the parents to produce Jonathan for an independent psychological examination. The BSEA took the request under advisement pending the outcome of the hearing. By July 1, 1991 Jonathan's family had moved from Framingham.

FINDINGS AND CONCLUSIONS

There is no dispute here that Jonathan is a student with special learning needs as defined by M.G.L. ch. 71B and 20 U.S.C. 1401 et seq. and is thus entitled to a free, appropriate public education. This matter centers on whether the provision of intensive, independent psychotherapy to Jonathan and to his parents, was the responsibility of the Framingham Public Schools during the 1989-90 and 1990-1991 school years. After careful consideration of all the evidence, and of the arguments of counsel for both parties, I have concluded that it was not.

First, there is no credible evidence in the record to support the request for school-provided parental therapy. There are no evaluations of Jonathan which recommend parental therapy as an adjunct to his school program. Dr. Rothney, the treating psychiatrist, testified that his treatment concerned long-

standing individual issues present in the parents since their adolescence and not related to Jonathan's education. Ms. Rohrbaugh did not testify, but neither did she at any time coordinate her services with either Framingham or the Clearway School. There is nothing in the record to link the parents' therapy to Jonathan's educational performance, or for that matter, to Jonathan at all. Thus the parents request that the Bureau order payment for their individual therapy pursuant to state and federal laws guaranteeing an appropriate education for disabled students must be denied.

Similarly, the parents have failed to prove by a preponderance of the evidence any nexus between Dr. Rothney's individual psychotherapy with Jonathan and Jonathan's educational needs or performance. When Jonathan began treatment with Dr. Rothney, in the Fall of 1989, there were no recommendations for the type and intensity of therapeutic intervention undertaken by Dr. Rothney. (See P-4, 5, S-5). There were no indications from his in-school behavior that Jonathan needed twice weekly psychiatric intervention. (O'Brien) While individual counseling is a legitimate "related service" under both state and federal special education law, the counseling must be designed to assist the student to benefit from the special education, and must be directly related to the achievement of the IEP objectives. (See 603 CMR s. 28.0.503.) In this case, Dr. Rothney admitted he was unaware of the special education services Jonathan was receiving through the Framingham Public Schools. He did not know the objectives of Jonathan's IEP. He did not communicate with the school in any way. He did not solicit the school's views on Jonathan's behavior, needs, or school performance. He made no suggestions to the school about techniques, approaches, interventions or educational milieu. It is impossible to find a logical link between the school's special education services and Dr. Rothney's individual sessions with Jonathan. This lack of coordination between school and individual psychotherapy continued through Jonathan's 1990-1991 school year placement at the Clearway School, since there was no communication between Dr. Rothney and the Clearway staff. (Rothney) Without a showing of a "nexus" between a service secured by the parents and the special educational services provided by the school, public funding must be denied.

The parents request for reimbursement of expenses related to Dr. Chaskelson's group therapy sessions must also be denied for a combination of reasons. Dr. Chaskelson, after an evaluation conducted in May, 1990, was the first person to diagnose Jonathan as having Attention Deficit Disorder and to recommend that he attend a peer support group. (S-6, P-2) Dr. Chaskelson happened to conduct such a group. Because the evaluation report contains several internal inconsistencies and makes several important conclusions without any apparent foundation, I can accord it limited weight. This fact, combined with the lack of evidence of

coordination once again between school-based and outside services provided to Jonathan offers little basis for discovering a nexus between Dr. Chaskelson's services and those provided at the Clearway School during 1990-1991. The parents' unilateral choice of a private school which does not provide the full range of special education services appropriate or necessary for their child, does not entitle them to automatic supplementation of an inadequate private program by the public school. Where, as here, the parents knowingly enroll their child in a program which lacks services they deem to be essential to a fully appropriate education, they bear the risk that the desired services will be provided only at parental expense.

Though the parents argued that Framingham had committed serious procedural violations in the course of its stewardship of Jonathan's special education program, the record reveals only technical regulatory violations of a minor nature. The parents point to the fact that the proposed 1990-1991 IEP was delivered to them more than ten days after the TEAM meeting, and the fact that a phone call was not returned while the special education director was on parental leave, as evidence that Framingham ignored the student's procedural rights. The credible evidence does not support such a finding. The record reveals numerous attempts by Framingham to maintain open communication channels, including 12 TEAM meetings in one year. None of the alleged procedural improprieties can be linked to the substance of Jonathan's special education program. Moreover there is no connection whatever between any of the events complained of by the parents, and the psychotherapy services for which they seek reimbursement.

ORDER

Parents are not entitled to reimbursement for independent psychotherapy services secured by them for the student and for themselves during the 1989-1990 and 1990-1991 school years.

By the Hearing Officer

Lindsay Byrne (KPA)
Lindsay Byrne

Dated 11/11/91

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

3/3/92

IN RE: DAVID M.

BSEA #91-0976

DECISION

This decision is rendered pursuant to Massachusetts General Laws, Ch. 71B, 30A, 20 USC 1401 et seq. and to the regulations promulgated pursuant to such statutes.

A hearing on the above-numbered case was held at the Central Office of the Department of Education, 1385 Hancock Street, Quincy, MA. and at the Waltham City Hall Annex, Waltham, MA on September 17, 19, October 7, 10, 22, 1991. Pursuant to the request of both parties, and then at the request of the parent, the record remained open until December 10, 1991 for receipt of closing arguments.

Persons present for all or part of the hearing were:

Mrs. M.	Mother of David M.
William Monahan	Attorney for David and his mother
Noreen Curran	Advocate for David and his mother
Edleff Schwaab	Independent Psychologist
Robert Edling	Psychologist, North Shore Children's Hospital
Bonnie Darius	Speech/Language Pathologist, North Shore Children's Hospital
Deborah Awerman	Ch. 766 Liaison, Carroll School
Steven Hickey	Ch. 766 Liaison, Carroll High School
Eileen Assad	Teacher, Carroll School
Susan Parrella	Assistant Special Education Director, Waltham Public Schools
Miriam Freedman	Attorney for Waltham Public Schools
Jeanne Kelly	ETL, Waltham Public Schools
Ann Murray	Special Education Teacher, Waltham High School
Margaret Callahan	Teacher, Waltham Public Schools
Jane Grace	Educational Psychologist, Waltham Public Schools
Helen Klim	Speech/Language Therapist, Waltham Public Schools
Barbara Hetlick	Teacher, Waltham Public Schools
Sandra Sherwood	BSEA Hearing Officer

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ISSUES

I. Whether the parent waived her right to request a hearing regarding the 1990 - 1991 school year for failure to request such hearing during the pendency of the IEP; if not,

II. Whether Waltham Public School's (hereafter, Waltham) 1990 - 1991 IEP calling for a 502.4 prototype placement at the Kennedy School maximizes David M.'s opportunity for educational development in the least restrictive setting;

III. Whether Waltham's 1991 - 1992 IEP calling for a 502.3 prototype placement at the Waltham High School maximizes David M.'s opportunity for educational development in the least restrictive setting;

IV. Whether the Carroll School, a private day school for special education students, is the least restrictive setting in which David can maximize his educational development for the 1990 - 1991 and/or the 1991 - 1992 school years.

POSITION OF THE PARENT

David has finally become invested in learning while at the Carroll School, and should be provided a continued education there in order that he can make the gains in a stable, continuing educational setting. Second, the program provides the language based program needed for David. Third, David had difficulty while attending the Waltham special education program during the fourth - fifth grades and does not want to return to such setting. Finally, Waltham's programs fail to provide the language based program with similarly disabled peers so needed for David.

POSITION OF THE SCHOOL

Waltham's 1990 - 1991 and 1991 - 1992 IEP's both provide special education programs which address David's learning disabilities in that the teachers are trained, and the settings allow for the provision of the teaching methodologies prescribed for David. Further, Waltham offers appropriate peers for David. Waltham also offers mainstreamed non-academics experiences as well as academic experiences when David is ready for them. Finally, David's previous experience in Waltham is not relevant to the current programs, but at any rate, were positive experiences wherein he made educational progress. Waltham's program provides a less restrictive setting in which David can maximize his educational development.

STATEMENTS OF THE FACTS

1. David is a fifteen year old intelligent ninth grader who has learning disabilities, particularly in the higher level language skills, reading and writing skills, organizational skills, and memory skills. (Edling, Schwabb) The parties dispute whether he has attentional deficits. David also has emotional difficulties regarding his self-esteem and motivation, as a result of his

academic difficulties. (Testimony of Edling, Awerman, Schwaab, Kelly, School Exh. 4, 17, Parent Exh. 2, 3, 7)

2. David attended the Belmont Day School, a private school, for the first - third grades. Due to difficulties there, he was diagnosed as having learning disabilities and an attentional deficit. He transferred to the Waltham Public Schools in order to receive special education for the fourth - fifth grades (1986 - 1988). (Testimony of Schwaab, Mrs. M.) Such services were provided in a 502.2 prototype setting beginning in March, 1987 through the 1987 - 1988 school year. (School Exh. 8) The parties dispute whether such schooling was a positive experience for David. Mrs. M. asserts that he made little academic progress and was berated by his teacher. (Testimony of Mrs. M) Waltham asserts that David made academic gains, had no such problems with his teacher, and made friends. (Testimony of Callahan)

3. In September, 1988, Mrs. M. unilaterally placed David at the Carroll School where he has received a special education program designed for the needs of learning disabled students who have at least average intelligence and who have learning disabilities. (Testimony of Awerman, Parent Exh. 14) In this setting, he is taught language arts, social studies, math, and science in settings of five - seven students: one teacher for the 1990 - 1991 school year. He is taught language arts, (4:1), social studies (8:1), math (5:1), science (12:2), health and physical education (9:1) for the 1991 - 1992 school year. (Testimony of Awerman, Hickey) The parties dispute whether David's peers are similar to David in their disabilities, and whether David has made sufficient educational progress while at the Carroll School. (Testimony of Awerman, Hickey, Kelly, Parrella)

4. In November, 1989, Mrs. M. contacted Waltham regarding the need for a TEAM evaluation. Waltham in fact conducted evaluations in January, 1990 (School Exh. 4). The parents then obtained independent evaluations at the NSCH in July, 1990 (Parents Exh. 2 - 7) After receiving the reports in October, 1990, Waltham convened the TEAM and developed David's November, 1990 - June, 1991 IEP calling for a 502.4 prototype program. Such provides for daily special education classes in written expression, reading, social studies, science and math, in the learning center. His classes were to be taught in settings of three - six students: one teacher. He would also be provided weekly individual counseling. (Parent Exh. 16, Testimony of Parrella) Mrs. M. rejected this IEP in November, 1991 and continued to place David at the Carroll School. Although the parties attempted mediation with a DOE mediator, no resolution was obtained, and no request for a BSEA hearing was made.

5. In June, 1991, Waltham again obtained evaluations in order to develop David's 1991 - 1992 IEP. (School Exh. 17) After convening the TEAM, Waltham developed a 1991 - 1992 IEP for David calling for a 502.3 prototype program at the Waltham High School. (School Exh. 1) Such provides for special education classes daily in English, social studies, and science; support classes

three x week, and counseling once x week. David would be taught in classes of five to eight students, with a total of fifteen special education peers. The parties dispute whether these peers are similarly disabled students who would be appropriately grouped with David. (Testimony of Edling, Murray) Mrs. M. rejected this IEP in June, 1991 and requested a BSEA hearing in July, 1991. She continues to place her son at the Carroll school, asserting that the Carroll School is the least restrictive setting in which David can maximize his educational development. (Testimony of Mrs. M.)

FINDINGS AND CONCLUSIONS

I. I find that Mrs. M.'s appeal of Waltham's November, 1990 - 1991 is properly before the BSEA and I therefore take jurisdiction of that IEP as well as the 1991 - 1992 IEP. Although Mrs. M. did not request a BSEA hearing during the life of the November, 1990 - 1991 IEP, she rejected such during the period and entered into mediation with Waltham. Accordingly, Waltham is certainly on notice of a dispute. Contrary to counsel's argument, the Chapter 766 regulations nor the federal regulations limit the right of appeal to the life of the IEP. Instead, the law allows appeal "on any matter concerning the ... proposed IEP...", without any mention to a time constraint on such appeal." (See Chapter 766 regulation, 402.0) Contrary to counsel's argument, the appeal of the 1990 - 1991 IEP is indeed the appeal of a proposed IEP, even if it is at this time expired. The IEP was in fact proposed, and Mrs. M. has a right to the appeal of such. If a more lengthy time period were involved in this case, it would be necessary to look at issues of notice to the parties, ability to prepare, etc., but such does not apply here. Waltham knew of the disagreement, mediation had occurred, and the request for the hearing was made at the end of the following school year. Accordingly, Waltham's motion to limit the hearing to consideration of the 1991 - 1992 school year is denied. This, of course, does not address the substantive issues regarding the equitable right to reimbursement, only whether the parent has the right to seek equitable relief. She does. Whether she in fact obtains such relief is a different matter, and is discussed below.

II and III. I find that Waltham's November, 1990 - June, 1991 IEP calling for a 502.4 prototype placement at the Kennedy School, and the 1991 - 1992 IEP calling for a 502.3 prototype placement at the Waltham High School, maximizes David's opportunity for educational development in the least restrictive setting, as follows:

1. A full understanding of David's strengths and weaknesses, educational learning style, learning/language disabilities, and

emotional makeup is essential in order to determine the appropriate placement for David. A review of the documents as well as the testimony evidence, at first glance, differing views. Waltham appears to view David as a student who is functioning basically at grade level, both in many academic skills as well as in language abilities. He is a student who, if deficient at all, is so because of a lack of exposure to a broad base of information at home and at the Carroll School. (See School Evaluations, School Exh. 4, 17) The parent, on the other hand, views David as a student who is functioning well below grade level in many academic skills, has a moderate language disability, has attentional deficits, and has self-esteem issues. (See NSCH Evaluations, Parent Exh. 2, 3) Given this apparent difference in viewing David, the parent's unwillingness to place David in the Waltham program is understandable. No parent willingly places her child in a program where her child is perceived so differently.

A closer look at the views of the two parties evidence a different story. That is, there is a fair degree of agreement, or at least acceptance, regarding David's skills, strengths and weaknesses. Each of Waltham's IEP's acknowledge many of the NSCH views of David. Given that such IEPs reflect the TEAM's view of David, such becomes the official position of Waltham, despite the fact that such may be somewhat inconsistent with any individual assessor's view. Thus, Dr. Grace and Ms. Kelly may have written evaluations which reflect the view that David was functioning predominantly at grade level and failed to mention in any substantive way, that David had learning disabilities. However, the TEAM, after reviewing the Waltham, NSCH, and Carroll School reports, concluded that David indeed had learning disabilities, and functions below grade level. The November, 1990 - June, 1991 IEP describes David as having weak organizational and study skill, mild attentional difficulties impacting on his ability to comprehend and solve problems. It describes him as having difficulties in spelling, reading comprehension and written expression and areas which require complex language demands. It describes him as having memory deficits. (See IEP's Student Profile, School Exh. 2) Its current performance levels recognize his weaknesses in written language, reading comprehension (the passage comprehension score is more than a year below grade level), social studies and science (the scores are more than a year and three years below grade level, respectively), and math. Finally, it recognizes the need to address David's self-esteem. (See IEP, School Exh. 2) This description of David incorporates much of the findings of Drs. Edling and Darius, and therefore, is substantially consistent with their views of David. I recognize that it still reflects a difference in the extent to which David has below grade level academic skills. However, the basic acceptance is there that David has language/ learning disabilities that must be remediated and that his academic skills are below grade level. It is unfortunate that Waltham's evaluators did not on their own diagnose the extent of his learning disabilities and his lack of academic skills; such would have facilitated a better working relationship between the

parties. However, the important question is whether Waltham, when it had the more extensive diagnoses, was able to incorporate such and develop an appropriate special education program for David. I find that it did.

Secondly, I find that, given David's profile, the parties have a fair degree of agreement as to the appropriate educational structures and teaching methodologies necessary for David to maximize his educational development. Waltham's evaluators recognized the need for a multisensory teaching style (See Kelly's report, School Exh. 17), the need, albeit subject to future review, for a small group learning center setting for language arts and for support to mainstreamed classes. (See Grace's report, School Exh. 17) Further, after reviewing the Waltham, NSCH, and Carroll reports, Waltham's TEAM recognized, as evidenced by the IEP's which it issued, David's need for the small group, multisensory, special education setting for most of David's academic learning. (See School Exh. 1, 2) Again, it would have been desirable if Waltham's evaluators had initially recognized the extent to which David requires the special education, small group, highly structured setting, for such would have facilitated a better relationship between the parties. However, the fact is that Waltham's TEAM, after reviewing the NSCH and Carroll School reports, recognized David's need for such special education services, and in fact offered such to David in the November, 1990 - June 1991 and the 1991 - 1992 IEPs.

The one area wherein the parties continue to disagree is the extent to which David is language disabled and requires a language based program. The parent asserts that he is not just learning disabled, but has higher level language disabilities which place him in a different category of students. The parent asserts that he requires a language based program wherein he is with similarly language disabled students, where the curriculum provides a focus on language and provides a consistency throughout the program in the teaching of language. (See Darius' NSCH report, Parent Exh. 6) Waltham acknowledges David's deficits in higher level language skills, but asserts that this does not render him different from the proposed peers, that the proposed teachers are able and experienced in addressing his language needs and can provide the consistency needed. This unresolved dispute is not problematic, as long as Waltham can meet David's needs, as described by the parent's evaluators, Dr. Edling and Dr. Darius. Indeed, Waltham can do so. Acknowledging his higher level language deficits, as described in depth by Dr. Edling and Dr. Darius, Waltham's program provides the educational elements as detailed by them in their reports, ie., a sufficient number of peers who are appropriate for him, teachers who are sufficiently experienced and trained to address his language needs, and a curriculum which can offer sufficient focus on language and sufficient consistency so as to maximize his educational development. (See School Exh. 24, Parent Exh. 2 - 7, Testimony of Edling, Darius)

2. Waltham provides David with teachers who are sufficiently

equipped to address his learning as well as language disabilities, as described by Edling and Darius. At the outset, it should be noted that the focus of Drs. Edling's and Darius' testimony, albeit extensive, creditable and thorough, was on David's needs as opposed to an analysis of the proposed programs. Dr. Edling's concerns regarding the proposed programs were raised more as questions to be asked rather than opinions about the program. After a careful look into each of these legitimate concerns, the evidence is persuasive that the programs appropriately address David's educational needs.

Waltham's 1991 - 1992 ninth grade teacher, Ms. Murray, is special education certified, she has worked with learning disabled students for four years in the study skills area, giving her much experience in teaching organizational and study skills - specific areas of weakness for David -, she has been trained in the teaching of executive functions - a specific area of weakness for David -, she is strongly interested in developing motivation and self-esteem in her students - again, a specific area of need for David -, and finally, she provides a highly structured teaching style so necessary for David, given his organizational, language, and memory deficits. She testified in depth as to how she can implement the teaching techniques recommended by Edling and Darius. (Testimony of Murray) Dr. Edling, who was thoroughly familiar with David's learning profile, was in fact impressed with her, and stated in very clear terms why he was so impressed. His only concerns were not with her teaching abilities or techniques, but with the integration of the curriculum and the skill level of the other students, issues addressed below. (Testimony of Edling) Further, although Dr. Darius stated in her written recommendations that David's teacher must be trained in the teaching of language disabilities, her testimony was less than persuasive that therefore, Ms. Murray was not qualified for David. First, her testimony did not focus on the need for such a specific expertise, raising doubt as to the need for this specific expertise. Likewise, her colleague, Dr. Edling gave little focus on the need for such expertise. Ms. Murray was persuasive that she, as a learning disabilities teacher, in conjunction with a speech/language therapist, could address David's learning/language needs. She provided extensive examples of how she would teach to David's language and learning needs, and in fact works with the speech/language one - two times per week. (Testimony of Murray, School Exh. 1)

Waltham's 1990 - 1991 eighth grade teacher is likewise appropriate for David. Although the teacher was unavailable for testimony, Dr. Parrella was persuasive that the teacher can provide for David's needs, as defined by Edling and Darius. She is special needs certified, has many years of teaching experience, and works in consultation with a speech/language therapist. Her teaching style is multisensory, highly structured, emphasizes language and organizational skills. (Testimony of Parrella) The parent provided no evidence which would bring doubt to the ability of such teacher to provide David with the teaching methodologies and curriculum necessary for

David. (Testimony of Edling, Darius)

3. Waltham provides David with peers sufficiently similar to David so that David's skill levels and learning style can be addressed by the teachers, as recommended by Edling and Darius. It must first be noted that there was no focus on this issue during the presentation of the parent's case. The parent is correct that Darius' report calls for peers who are similarly language disabled. It is striking, however, how little testimony there was on this issue. The one statement that was made was by Dr. Edling who testified that he questioned whether the ninth grade class was taught at a lower level than appropriate for David. He did not address a concern that the students were insufficiently homogeneous in their language disabilities. Not until Waltham presented its case did the parent raise the issue of sufficient homogeneity of peers. Yet, still, since it is raised, it must be addressed. Waltham is sufficiently persuasive in its assertion that the proposed peers are learning disabled with language deficits. A review of the IEP's evidences a sufficient number of students with similar learning disabilities so that David's learning and language deficits can be properly addressed. Of the seven students in his ninth grade english class, at least four, and probably six, clearly have learning disabilities. That is, three of them, students C, D, and E, receive speech/language therapy for language issues; students A and F have written language and reading deficits; and student F also has auditory perception deficits. Only student G may have no learning disabilities. (Parent Exh. 17) There is no evidence that given the majority of learning disabled students, having one student who is not similarly disabled, would deny David the teaching methodology and curriculum needed to address his language/learning deficits. (Testimony of Edling, Darius) Instead, the IEP's support Ms. Murray's testimony that all but one student has language difficulties and that she uses teaching methodologies appropriate for David's learning/language disabilities. Although the IEP's do reflect a range of skill levels, David's test scores also reflect a wide range of skills. Given the fact that the teacher uses predominantly grade level texts, such range of skill levels is of less significance. Although the social studies and science classes may have a smaller percentage (two of the four) with similar learning disabilities, and the science class is unclear, I note that there is a sufficient number of the students in the english class who also attend the social studies and science class, to allow for the integration of content and methodologies to assure the continuity necessary for David. (Parent Exh. 17) Thus, Waltham is sufficiently persuasive that, on the whole, the peers provide the necessary learning/language deficits requiring similar teaching methodologies and curriculum as David.

Upon consideration of the parent's as well as Waltham's evidence regarding the eighth grade peers, Waltham was similarly persuasive that its proposed peers are sufficiently learning disabled for David. First, it must be noted that there was no evidence from the parent's witnesses regarding these peers, and

the IEP's of these students were less illuminating. However, on balance, Ms. Parella's testimony must be credited that these students are learning disabled. When considered together with the IEP's, the students clearly evidence deficits in their study and organizational skills - clear areas of deficit for David. Further, students A, C, have deficits in the language areas; student B has difficulties with inferential comprehension and english is a #1 priority; and student D has memory deficits and has weaknesses in decoding, spelling and grammar. (Parent Exh. 16)

4. Waltham provides David with a curriculum at an appropriate skill level, with sufficient integration of subject matter and teaching methodologies so as to meet David's needs, as delineated by Edling and Darius. First, the texts for the eighth and ninth grade programs are predominantly grade level, as recommended by Edling. (Testimony of Murray) Although Dr. Edling questioned the skill levels being taught in the ninth grade, his comment reflected more of a concern as opposed to a certainty, and it was based on little information. Given the direct testimony from the teacher who is using the texts, she is credited as having the knowledge. Although the IEP's may reflect many skills below grade level, this does not, by itself, discredit Ms. Murray's testimony, for she uses grade level texts but also provides the necessary supports to address the lower level skills. (Testimony of Murray) Such is in fact recommended for David. (Testimony of Edling.) The parent provided no evidence disputing the level of curriculum for the eighth grade program. Further, Waltham is in a good position to provide the integration of subject matter as well as teaching methodologies as recommended by Edling and Darius. Given the fact that the academic subjects are taught predominantly by one teacher for each year, she is easily able to carry her teaching methodology and subject matter throughout the day. Although the peer groupings change somewhat, there are enough peers who take several classes with David to facilitate this carryover. Further, because the class sizes are so small, the teachers can easily provide the individualized attention in integrating David's program. Finally, Waltham provides the joint work between the teacher and the speech/language therapist, wherein consultation can facilitate the integration of language goals and objectives. The parent's major dispute regarding the integration of curriculum resulted from a review of the IEP's. Although the question is a legitimate one, for the integration is not clearly developed in the IEP's, Waltham was persuasive that it can implement it as recommended by Edling and Darius. In fact, both experts testified that they saw no reason why it could not be implemented. (Testimony of Edling, Darius)

5. Waltham provides David with mainstreaming opportunities, predominantly in the nonacademic area, but possibly in math, so as to maximize David's integration with non-handicapped peers. Such is particularly appropriate for David, given his level of intelligence, his ability to conceptualize, his interest in music, and his generally social and friendly nature. To deny David with these opportunities does a disservice to him. There

is nothing in Edling's or Darius' evaluation which would indicate his inability to integrate successfully with non-handicapped peers in non-academic and possibly math classes, as long as his higher level language difficulties are not unduly challenged in those settings.

6. The parent's assertion is well taken that Waltham failed to involve the appropriate experts in the TEAM process; neither a teacher currently involved with David nor a speech/language pathologist were present in the development of the November, 1990 - 1991 and the 1991 - 1992 IEP's. Such violation, however, is not outcome determinative in that the IEP's, on the whole reflect an appropriate program for David, and Waltham has the teachers and classes wherein the IEP's can be implemented. However, if David were to return to Waltham, a reconvening of the TEAM is warranted in order to refine the goals and objectives.

7. The parent's assertion that David should not return to the Waltham Schools because of his past experience there certainly evidences her dedication to finding the best for her son; placing him in a program where she believes he can flourish both academically and emotionally is paramount. However, a review of the test results indicate that he did make educational progress in that program. Further, that program differed from the 1990 - 1992 proposed programs in that it called for merely three hours/week of special education services, and the school and teacher were different. Thus, there is nothing similar to that experience other than the fact that both programs are provided by the Waltham Schools.

IV. Although the Carroll School may have provided David with good educational services, they are provided in a restrictive setting not necessary for David, and is therefore not the appropriate placement. Accordingly, reimbursement for Mrs. M.'s unilateral placement there is not called for. Although her decision to place her son there may have been well motivated, reimbursement would not be called for where an appropriate program was available in a less restrictive setting. Where Waltham had a program, albeit needing some minor modifications, reimbursement is not called for.

ORDER

Waltham is not responsible for reimbursing Mrs. M. for Carroll School tuition expenses during the November, 1990 - 1991 and 1991 - 1992 school years. If David should decide to return to Waltham, upon notice to the school, Waltham shall immediately reconvene the TEAM with the appropriate evaluators in order to refine the goals and objectives of the 1991 - 1992 IEP, in accordance with the above made findings.

2. The second part outlines the various methods and tools used to collect and analyze data. This includes both traditional manual methods and modern digital technologies, highlighting the benefits of each approach.

3. The third part focuses on the role of the management team in overseeing the data collection process. It stresses the need for clear communication and coordination between different departments to ensure that data is collected consistently and accurately.

4. The fourth part discusses the challenges faced during the data collection process, such as data quality issues, incomplete information, and the risk of data loss. It provides strategies to mitigate these risks and ensure the integrity of the data.

5. The fifth part describes the process of data analysis and interpretation. It explains how the collected data is processed, analyzed, and then used to draw meaningful conclusions and inform decision-making.

6. The sixth part covers the final steps of the data collection process, including the storage and archiving of data. It emphasizes the importance of secure storage and regular backups to prevent data loss.

7. The seventh part discusses the ethical considerations surrounding data collection and analysis. It highlights the need to protect individual privacy and ensure that data is used responsibly and in compliance with relevant laws and regulations.

8. The eighth part provides a summary of the key findings and conclusions of the study. It reiterates the importance of a systematic and transparent approach to data collection and analysis for achieving the organization's goals.

9. The final part of the document includes a list of references and a bibliography, citing the various sources and materials used in the research and analysis.

By the Hearing Officer:

Sandra Sherwood
Sandra Sherwood

Dated: 3/2/92

6/2/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: HEATHER K.

BSEA #91-1182

DECISION

This decision is issued pursuant to M.G.L. Ch. 71B, 30A and 15, 20 U.S.C. ss. 1401 through 1461, 29 U.S.C. s. 794, and the Regulations promulgated under those statutes. The parties elected to submit written evidence without oral testimony, to the Hearing Officer, as is permitted by 603 CMR s. 28.0. 404.1(h). The Hearing Officer conducted a thorough and independent review of the documents offered in evidence jointly by the parties. The facts established therein fully support the stipulations reached by the parties. Therefore, those stipulations are incorporated into this decision and set out in relevant part below:

SUMMARY OF THE EVIDENCE

1. Heather K. ("Heather") is a sixteen-year old young woman who is a resident of Falmouth, Massachusetts. Her current educational placement is in a 502.4 program operated by the Cape Cod Collaborative and located to Bourne High School. (See 1991-92 proposed IEP, attached as Exhibit 1.)
2. Heather has multiple disabilities related to Klippel-Feil syndrome and congenital occipital encephalocele, including cerebral palsy resulting in spastic quadriplegia, moderately-severe to severe-profound hearing loss, legal blindness (although she does have some functional vision), profound to severe cognitive and developmental delays, a seizure condition and asthma. (See July, 1991 report by Perkins School for the Blind, hereinafter "Perkins Report," attached as Exhibit 2.)
3. Heather has significant physical limitations and uses a wheelchair and walker for mobility. She requires assistance in all areas of self-care, but can finger-feed herself independently, drink from a cup and remove some clothing. She is not toilet-trained. Heather does not use spoken or sign language; she communicates with non-verbal behaviors, gestures and vocalizations. According to testing done in July, 1991 at the Perkins School for the Blind, Heather functions cognitively between the 6.5 month and 12 month level (Exhibit 2). Other test results show Heather's skills to cover a wider range. (Exhibits 3-11).

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4. Heather has undergone multiple evaluations of her disabilities and educational needs by a number of facilities, including recent evaluations by the Cape Cod Collaborative, Children's Hospital Medical Center, the New England Regional Center for Deaf-Blind Services, Falmouth Public Schools, and the Perkins School for the Blind. Reports from these evaluations are attached as Exhibits 3 through 11, respectively.

5. While there may be some minor variations in the conclusions and recommendations of these evaluators, there is a consensus that for Heather to receive maximum benefit from an educational program, such program must address her needs in many areas, including, but not limited to, communication, self-help and daily living skills, use of functional vision, prevocational and vocational training, peer relations, and development of physical strength and mobility. (Exhs. 2-6, 8, 10, 11). IEP goals and objectives for Heather should be functional and an educational program for her should be geared towards helping her achieve maximum independence in light of her disabilities.

6. Because of the severity of her disabilities, the issue of Heather's ability to generalize is always of concern. The goal is to have her generalize the IEP skills learned at school to her living situation and community. Therefore, if the objective of maximizing independence is to be achieved, many of these IEP activities should be carried out during all waking hours, at home or in another residential setting. Also, because of Heather's unique communication needs resulting from cognitive and sensory impairments, the communication systems and techniques used during school hours should also continue during all waking hours at home or at another residential setting to enable Heather to develop a functional communication system. (See, e.g., Perkins Report, Exhibit 2.)

7. The Kennedy-Donovan Center in New Bedford, MA., is a private school and agency providing a variety of educational and social services to children and adults with developmental disabilities. (See, description at Exh. 12). Kennedy-Donovan operates a day school which has been approved by the Department of Education. Heather has been accepted into Kennedy-Donovan's day school. (Exh. 13). Kennedy-Donovan also operates a specialized home care program which provides continuity, consistency, and reinforcement of techniques, interventions and skills set out in a student's IEP in a residential setting. This residential component is licensed by the Office for Children, but is not approved by the Department of Education. Heather has been offered a place in Kennedy-Donovan's specialized home care program.

8. Heather has applied to several traditional residential schools. All but one has rejected her. The parties agree that any residential school setting appears to be more restrictive than is consistent with recommendations for developing Heather's

educational potential to the maximum extent feasible in the least restrictive setting. The parties agree that the Kennedy-Donovan program, a tightly coordinated and integrated day/specialized home care program, is an appropriate educational placement for Heather. This agreement is supported by the evidentiary record. The Kennedy-Donovan program is the least restrictive, appropriate placement for Heather about which evidence was submitted.

CONCLUSIONS OF LAW

The evidence amply supports the parties' agreement that the combined day/specialized home care program offered by the Kennedy-Donovan Center, is the least restrictive, appropriate educational placement available to Heather. The fact that the residential component of the program is not currently approved by the Department of Education is not a bar to Heather's placement there, when that placement is essential to assure the provision of a free, appropriate public education, as it is here. 603 CMR s. 28.0. 404.4. See also: Carrington v. Commissioner of Education, 404 Mass. 290, 535 NE2d 212 (1989). While the day school/specialized home care program selected jointly by the parties, after an extensive and time-consuming search of all available options, is unusual, it has precedent. In 1983, the First Circuit Court of Appeals approved a proposed residential educational placement combining a day program with a community group home. Abrahamson v. Herschman, 701 F.2d 223 (1st Cir. 1983). Not many school districts have pursued community-based residential options for students requiring this level of educational intervention, but the lack of interest does not mean that such combination programs are legally unsound. Indeed, the type of creative program design advocated by the parents and the Falmouth Public Schools in this instance not only fulfills the strict regulatory requirements for providing a continuum of educational placements (See 603 CMR s. 28.0. 500; 34 CFR s. 300.600), but furthers the spirit of the IDEA. Innovative educational programming finely tailored to the unique learning needs of each individual student is exactly what the framers of the IDEA contemplated, and what the parties here working cooperatively have achieved.

ORDER

Falmouth Public Schools is hereby ordered to develop a 502.6 Individualized Educational Plan for Heather K. consistent with this Decision.

By the Hearing Officer

Lindsay Byrne
Lindsay Byrne (KRA)

June 2, 1992
Date

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Matthew J.

BSEA #91-1483

RULING ON MOTION TO JOIN
THE MASSACHUSETTS DEPARTMENT OF EDUCATION

This case involves a long-standing dispute regarding Matthew J.'s right to a free and appropriate special education. The parents of Matthew J. (hereafter, Parents) assert that the Masters School, a private day school in Connecticut, when combined with related services, is the only school able to provide for Matthew's special education needs. They assert that Granville Public Schools (hereafter, Granville) should reimburse them for their expenses incurred in sending Matthew to the Masters School. Granville asserts that, although it does not dispute the appropriateness of the placement, Granville was barred by the Massachusetts Department of Education (hereafter, DOE) from placing him at the school, for DOE denied the Sole Source Approval. (See Granville's Motion to Join)

On August 20, 1992, Granville filed a MOTION TO JOIN THE MASSACHUSETTS DEPARTMENT OF EDUCATION, asserting that the DOE is a necessary party in this case, that DOE has had direct involvement in this matter since August, 1989, and that all parties interested in the subject matter of litigation should be made parties thereto. (See Granville's Motion to Join)

On August 25, 1992, the DOE filed its OPPOSITION TO MOTION TO JOIN THE MASSACHUSETTS DEPARTMENT OF EDUCATION. In support of such opposition, it stated that any possible relief to the Parents would not include the participation of the DOE.

RULING

Granville's MOTION TO JOIN is denied, on the basis that any potential remedy in this case would not include an order directed to the Department of Education.¹ Joinder would be appropriate if, in the absence of the DOE, complete relief cannot be accorded among those already parties. (Massachusetts Rules for Civil Procedure,

¹ The DOE personnel may be required to testify, but the Subpoena process, not Joinder, is the appropriate action to acquire such testimony.

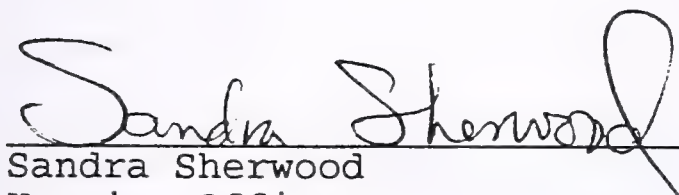
Rule 19(a)) The facts in this case do not support the need for such joinder. That is, if the parents were to prevail, the appropriate remedy would be reimbursement or compensation for expenses paid by them in placing Matthew at the Masters School. Such reimbursement or compensation would be an expense allocable to the public school only, not the DOE. Just as in any 502.5 prototype placement, the Department does not pay a portion of the tuition. (See DOE's OPPOSITION TO MOTION TO JOIN.)

Furthermore, if the Hearing Officer finds that reimbursement is an appropriate remedy, the Hearing Officer is authorized to order the reimbursement, despite the fact that the Department had not approved it. (See Carrington v. Commissioner of Education 535 N.E.2d 212 (1989)).

Finally, any remedy in this case would exclude the need for a prospective Sole Source approval, for Matthew has already graduated from high school and seeks no prospective services.

The BSEA Hearing in the above-numbered case shall convene on October 27th & 28th at 9:30 a.m.-4:00 p.m. at Catougn Court Reporting Services, 40 Southbridge Street, Worcester, MA. 01608

Signed,


Sandra Sherwood
Hearing Officer

Date: August 27, 1992

4/1/92

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: RUDOLF S.

BSEA #91-2105

DECISION

INTRODUCTION AND PRIOR PROCEEDINGS

This decision is issued pursuant to the authority accorded the Bureau of Special Education Appeals under the provisions of G.L. c.15, ss.1M-N, c.30A, c.71B; 20 U.S.C. ss.1400 et seq.; 29 U.S.C. s.794, and the regulations promulgated under those statutory provisions. This case involves the request by Ms. C., the parent of Rudolf S. (known as Sebastian), to have her son placed by the Lawrence Public Schools in Highwatch, Inc., a residential program, located in Ossipee, New Hampshire. Highwatch, Inc. is not approved by the Commonwealth of Massachusetts as a residential special education program. The Lawrence Public Schools agree that Sebastian, who is suffering from the effects of a traumatic brain injury, is in need of a residential special education program, but contend that he can be appropriately served in Massachusetts-approved residential placements at either Crystal Springs or the Massachusetts Association for the Blind (MAB).

The parent first filed a hearing request on June 21, 1991, requesting Sebastian's immediate placement at Highwatch, Inc. (Ex L-11). A prehearing conference with the parties was held on July 17, 1991. At the pre-hearing conference the parties agreed that prior to commencement of a hearing on the merits, application would be made to all Massachusetts-approved residential special education programs that could possibly provide appropriate programming to Sebastian, to see if a mutually-agreeable residential program could be located. (At that time Lawrence had only applied to the MAB program, and the parent had only applied to Highwatch.) The parties also agreed to a program of interim services to be provided to Sebastian during the search and application process (Ex L-9).

Following the pre-hearing conference, application was made for Sebastian's admission to: The May Institute, Crystal Springs, Evergreen Center, Perkins School for the Blind, Crotched Mountain Rehabilitation Center. Of those schools, only Crystal

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Mark Carper	Neuropsychologist
Dorsey Grandfield	Director of Programs, MAB
Diane Giunta	Agency Administrator, Crystal Springs
Michael S. Bearse	Attorney, representing LPS
Stephen Finnegan	Attorney, representing LPS
Jane Truesdale Ellis	Attorney, representing Student/Parent
Nancy A. Pearce	Attorney, assisting Attorney Ellis
Carole Ganz	Legal Assistant, assisting Attorney Ellis
Gina Giulmette	Court Reporter
Marybeth Coldwell	Court Reporter
Kristen Reasoner Apgar	Hearing Officer

ISSUE

Whether the Lawrence Public Schools have offered Rudolf S. (Sebastian) a free appropriate public education, which serves to maximize his educational development in the least restrictive environment, by offering to place him in the residential special education programs offered by Crystal Springs (BDU) or Massachusetts Association for the Blind (approved residential schools), or do his unique educational needs necessitate his placement in Highwatch, Inc., an unapproved residential program, in order to assure his maximum educational development?

POSITIONS OF THE PARTIES

PARENT/STUDENT'S POSITION:

The parent and student contend that Sebastian requires a program specifically designed to address the educational needs of TBI children in an age-appropriate setting. Although current testing places Sebastian at a very low cognitive level, this is more indicative of the attentional and behavioral deficits, caused by Sebastian's head injury, than an accurate measure of his educational potential. Only the Pediatric Adolescent Program at Highwatch provides a residential program, designed specifically for children and adolescents with traumatic head injuries like Sebastian. It alone can provide opportunities for appropriate normalization and socialization with children approximating Sebastian's age. Neither of the Massachusetts programs offered by Lawrence are designed for head-injured students, but rather are programs primarily for severely and profoundly mentally retarded students. All of the students in these programs are in their teens and early twenties, and thus, would not provide age-appropriate peers for Sebastian. They also contend that placing Sebastian with significantly older students in facilities for the severely and profoundly mentally retarded constitutes discrimination under Section 504 of the Rehabilitation Act of 1973 (Section 504). In addition unlike MAB and Crystal Springs, the Highwatch program is aimed at short-term rehabilitation with a goal of immediate return to less

Springs accepted Sebastian, proposing his admission to the Behavioral Disorders Unit (BDU). (Ex S-23. S-24, S-25, S-26, S-27). Lawrence then broadened its offer of residential placement to include Crystal Springs/BDU program, in addition to the MAB program. However, Ms. C. did not agree to either of Lawrence's proposed placements, contending that only the Pediatric Adolescent Program at Highwatch could provide an appropriate program for Sebastian.

On November 17, 1991, following a renewal of the parent/student's request for hearing, the parties reconvened in a second pre-hearing conference. A revised interim agreement on services was reached (Ex S-1), and the case was set for hearing.

The hearing took place on December 10, 11, and 12, 1991 and on January 7 and 8, 1992 at the Lawrence Public School Administrative offices. Following the conclusion of testimony the record remained open to admit additional documents from Highwatch, produced as the result of a subpoena duces tecum requested by Lawrence, and from Crystal Springs. In addition Lawrence was accorded the opportunity to recall witnesses from Highwatch, following review of the Highwatch documents. (Those documents have been included in the record as: S-46 - Documents pertaining to Sebastian's admission to Highwatch; S-47 - IEP's or other admission records on students admitted to the Pediatric Adolescent Program; S-48 - Profiles of students currently in the Pediatric Adolescent Program; S-49 - Pediatric Adolescent Program staff qualifications; BSEA-2 - Profiles of Crystal Springs peer group.) After this review Lawrence decided not to recall any witnesses from the school. Final written submissions from the parties were received on February 18, 1992, and the record closed on that date.

The following individuals were present for some or all of the hearing in this matter:

Jocelyn C.	Parent
David C.	Uncle
Judy C.	Aunt
Catherine C.	Aunt
Robert M.	Family Friend
Mark Alavosius	Director, Pediatric Adolescent Program, Highwatch
Douglas M. Buyer	Psychologist, Pediatric Adolescent Program, Highwatch
Francesca LaVecchio	Chief Neuropsychologist, SHIP Program
Michael J. Orcutt	Technical Assistant, SHIP Program
Mary E. Roach	Neuro Rehab Management, Inc.
Mary L. Bergeron	Program Manager, Lawrence Public Schools (LPS)
Stanley Barron	Education Team Liaison, LPS
Gayle E. Williams	Coordinator of Special Education, LPS

restrictive programs near the home community.

LAWRENCE PUBLIC SCHOOLS' POSITION:

The Lawrence contends that it has fulfilled its obligation under the state and federal special education laws to provide an appropriate residential special education program for Sebastian by offering to place him at Crystal Springs or MAB. Either program can provide Sebastian with the special education and related services that have been recommended by all specialists, who have evaluated and provided services to Sebastian. In particular they offer appropriate behavior management programs, and Sebastian's behavioral issues have been found to be the primary impediment to his educational progress. With respect to the issue of peer grouping, the relevant consideration for severely and profoundly impaired youngsters, such as Sebastian, is not grouping by chronological age, but rather functional age. The functional ages of the students in the Crystal Springs and MAB programs are in the same range as Sebastian's, even though they are older chronologically. As MAB and Crystal Springs are currently approved residential schools, there is no legal basis for ordering Sebastian's placement at Highwatch, under either the Chapter 766 "sole source" regulations or those regulations governing placements ordered by BSEA hearing officers.

FINDINGS OF FACT

STUDENT PROFILE AND EDUCATIONAL HISTORY

1. Sebastian S. is an eight-year-old boy, who incurred a traumatic brain injury in September 1988 at the age of five, when he was struck by a car. As the result of the brain injury, Sebastian suffers from "absence" seizures, severe attentional deficits, hyperactivity, and behavioral difficulties, which significantly interfere with his ability to learn and which make management of his behavior extremely difficult for his family, teachers, or other care-givers. His receptive and expressive language skills, personal care and other skills of daily living, and ability to socialize are severely compromised by his brain injury. His cognitive potential is uncertain, because his hyperactive behavior and attention deficits interfere with the ability to measure his cognitive skills. (Ex S-14, S-15, S-16, L-5A, TR I-23-38.)

2. Prior to his injury in September 1988, Sebastian suffered from mild cerebral palsy, which did not appear to seriously affect his cognitive skills. Sebastian was significantly premature at birth, and spent three months in a neo-natal care unit prior to discharge. As a result, he had some impairment of gross motor skills, and "toe-walked," requiring

braces. (Ex L-5A, S-14, S-15, Tr I-31-32). Sebastian attended a special education pre-school program in 1986 and 1987 in Lowell, Massachusetts, where he and his mother lived at the time. The last Individualized Educational Plan (IEP) prepared by Lowell in April 1987, stated that Sebastian's strengths were in the "cognitive, attending, receptive language, expressive language, and fine and gross motor skills areas," with weakness in pre-math skills. (Ex S-12) The IEP also stated that Sebastian was no longer in need of special education and that he should attend a regular pre-school program (Head Start). (Ex S-12). Sebastian would have entered school, as a regular kindergarten student, but was never able to begin school, due to the severity of the injuries sustained in the accident. (TR III-99-105).

3. Immediately following the accident, Sebastian was hospitalized at Children's Hospital, where he was treated for a closed head injury. (Ex L-5A, S-14). He was discharged about a month later to Spaulding Rehabilitation Hospital, where he was treated for seizures resulting from the head injury and severe attentional deficits. (Ex L-5A, S-14). As the result of continuing edema, Sebastian was readmitted to Children's Hospital three months later for an operation to remove subdural hematomas.

Sebastian returned to Spaulding, where he underwent therapy and evaluation until discharge in May 1989. At the time of discharge, Sebastian experienced as many as eight to ten seizures daily, during which time he hyperventilated and appeared to stare. He was also extremely hyperactive and unable to concentrate for even very short intervals. His behavior was described as "problematic and inconsistent," including such negative behaviors as biting, kicking, and scratching. While at Spaulding, Sebastian was treated with ritalin, haldol, and similar medications to address his attentional difficulties, as well as receiving medication for seizure disorder. (Ex L-5A, S-124, S-16).

4. In September 1989, Sebastian was placed by Lawrence in a diagnostic placement at the St. James Elementary School, in a program operated by the Greater Lawrence Educational Collaborative. It immediately became clear that the program could not manage Sebastian, so in November 1989, Lawrence placed him at the Behavioral Intervention Program (BIP), operated by the LABB Collaborative in Arlington, Massachusetts. (TR IV-90-92). Ms. C. was very satisfied with the program, and wished Sebastian to continue there. (Ex S-4, L-7A, L-7B, TR IV-92-96).

However, by the next fall (1990), the staff of the BIP program contacted representatives of the Statewide Head Injury Program for assistance, because they were having great difficulty managing Sebastian in their program, even with the addition of a one-to-one aide. (Ex L-6).

In response to BIP's concerns, Stanley Barron, Lawrence's Evaluation Team Liaison, arranged for Sebastian to receive an in-patient evaluation at Franciscan's Children's Hospital in November 1990. Franciscan's recommended residential placement, suggesting the May Institute or the Kennedy Day Program, located at Franciscan Hospital. (TR IV-94-98). Ms. C. did not wish to have Sebastian placed in a residential program, and continued to request that he remain at BIP. However, by January, 1991, the BIP staff were insisting that Sebastian could not remain in their program, and he was discharged from the program on February 1, 1991. To date, Sebastian has not been in an educational program, apart from the provision of interim tutoring and related services in his home. (Ex L-6, TR IV-90-100).

5. In an effort to accommodate Ms. C.'s desire that Sebastian remain at home, Stanley Barron applied to thirteen day programs seeking Sebastian's admission. None of the programs accepted Sebastian. For this reason Barron also applied to MAB's residential program. MAB agreed to accept Sebastian, based on the goals and objectives set out in the IEP developed for the BIP program. (TR IV-99-102)

6. Barron convened a TEAM meeting on January 15, 1991, to formulate the IEP for February 1991 to February 1992. Based on MAB's agreement to accept Sebastian in its program, Lawrence wrote an IEP, calling for a residential placement at MAB. (TR IV-98-99). Ms. C. visited MAB in February, 1991, but did not agree to the placement. (TR III-128-129.)

7. During this time representatives of the SHIP program recommended to Lawrence that an evaluation should be conducted by a neuropsychologist familiar with students with TBI. This was done by Dr. Francesca LaVecchio, SHIP's Chief Neuropsychologist. A report of her findings was completed in February 1991, although apparently the report was not provided to Lawrence until July. Dr. LaVecchio recommended that Sebastian be placed in a residential program geared to the needs of TBI students, and recommended the Highwatch program as one that SHIP used for TBI clients. Following this recommendation, Ms. C. visited Highwatch. (TR III-152-159).

8. On February 25, 1991, a second meeting was held at Tewksbury Hospital, including Dr. LaVecchio, representatives from Department of Public Health (DPH), SHIP, Stanley Barron, and Ms. C. Dr. LaVecchio recommended that Sebastian be placed by Lawrence at Highwatch. Mr. Barron stated that Lawrence had a placement for Sebastian and that they would not consider sending Sebastian to an unapproved program. Lawrence offered interim home tutoring. (TR IV-102-105).

9. Ms. C., did not sign or reject the proposed IEP, or agree to interim tutoring offered by Lawrence. (Ex L-8B, TR IV-

106-107). In April 30, 1991, Lawrence again offered to provide interim tutoring. In a letter from her legal counsel, Ms. C. informed Lawrence that she wished to have Sebastian placed at Highwatch, and that she did not consider the proposed IEP acceptable. (Ex L-8H). However, she asked that tutoring be provided in the interim. After some back and forth regarding Ms. C.'s ability to meet with the proposed tutor at her home, Stanley Barron, prepared an interim IEP, covering the period May 1991 to May 1992, calling for Lawrence to provide tutoring. (Ex L-8J). Ms. C., neither accepted nor rejected this IEP, but Lawrence began providing tutoring in May 1991. No other services were offered by Lawrence, although Sebastian received some physical therapy and home health services through Easter Seals. (Ex L-8H).

10. In June 1991, Ms. C. accepted the residential program prototype designation on the IEP calling for MAB, but rejected the MAP placement. On June 21, 1991, counsel for Sebastian and Ms. C. wrote to the BSEA requesting a hearing. (See, Introduction and Prior Proceedings, supra.)

ASSESSMENT OF SEBASTIAN'S EDUCATIONAL POTENTIAL

11. The first evaluation conducted, following Sebastian's head injury, was at Spaulding Rehabilitation Hospital. Dawn Shugarts, Speech-Language Pathologist at the Hospital, described Sebastian's language skills as evidencing "low, low communication potential." (Ex L-5A). Dr. Katherine Keating administered psychoeducational testing on May 26, 1989, but she was unable to reach any basal age on the Weschler Intelligence Scale for Children Revised, the Peabody Individual Achievement Test, or the Leiter International Performance Scale. On the Early Learning Accomplishment Profile, Sebastian achieved a mental age level of approximately eight months; on the Developmental Activities Profile, he was placed well below the one-year level; and on the AAMD Adaptive Behavior Scale, Sebastian was unable to feed, dress, or bathe himself. Dr. Keating concluded that Sebastian was functioning at levels ranging between eight and eleven months. The discharge summary from Spaulding also stated that Sebastian has plateaued with respect to his physical recovery from the head injury. (Ex L-5A).

12. The November 1990 Franciscan's Children's Hospital evaluation elicited similar, but slightly higher level results. Again, Sebastian's behaviors significantly interfered with the ability of the evaluators to establish scores on developmental tests. Sebastian was placed in a "can't get out" crib, and he slapped at people who came near him. Ms. C. was with Sebastian during the evaluation. Apparently, she was asked at various points to hold or restrain Sebastian, and part way through the

evaluation, which was scheduled to last four days, she called Stanley Barron to get his permission to leave. Although, Mr. Barron seemed to have had some reservations about this, he did not attempt to dissuade Ms. C., and the evaluation was terminated early. (Ex S-20A-20G, TR IV-92-97).

Overall, the Franciscan assessments placed Sebastian's functional levels at significantly under the eighteen months. There was evidence of a transcortical global aphasia, limiting Sebastian's ability to initiate and receptively respond to verbal requests other than by repeating information. Sebastian could sing and echo phrases, but he could not respond adequately to requests or instructions. His extreme disinhibition and lack of adequate appreciation of painful experiences was suggestive of severe frontal system dysfunction. (Ex S-16).

The occupational therapy evaluation could not be completed due to Sebastian's behavior. His highest skills were in the ADL's. The speech and language evaluation reported Sebastian's skills as scattering in the two to nine month level, clustering at the five to seven month level. The psychological evaluation using the Vineland scale placed Sebastian's communication domain at the eighteen month level, the daily living domain at the seventeen month level, and socialization domain between zero and eight months. While with the psychologist Sebastian was noncompliant and gave no indication that he was aware of the psychologist's presence. He did not follow directions. The physical therapist observed that Sebastian could move himself independently through the developmental sequence, however, his quality of movement was poor. (Ex L-20B).

The clinical conclusion was that the prognosis for Sebastian's being able to respond to a behavioral program was quite poor. Dr. John Anderson, who conducted the psychological evaluation concluded that "some sort of residential placement [will] eventually be needed," that Sebastian should be placed in a "program designed for severely impaired children," and a referral should be made to the Department of Mental Retardation. (Ex S-16, L-20A-20G).

13. Dr. Francesca LaVecchio's testing resulted in higher estimates of Sebastian's skill level. She too noted that he exhibited symptoms consistent with attention deficit hyperactivity disorder, limited attention span, impulsivity and low frustration tolerance. When he was challenged, Sebastian would throw objects, and make attempts at self-injurious behavior. However, Sebastian was able to respond to verbal praise and primary reinforcers. His verbal responses were nonfluent, dysprosodic, ecolalic, and at times, perserverative. Numerous absence episodes were observed, and were associated with intermittent disorientation. (Ex S-17).



Because of these many difficulties, Sebastian's cognitive skills were assessed with the Bayley (Mental) Scale of Infant Development. A basal age was achieved at an approximate twelve to fourteen month level, and items continued to be passed successfully up to an approximate twenty-five month level. He was able to name objects and pictures up to a twenty-four month level, complete a form board, speak in short sentences, and imitate crayon strokes. Receptive language skills were assessed with the Peabody Picture Vocabulary Test. On this measure, Sebastian attained an age-equivalent of 2 years, 2 months. In Dr. LaVecchio's opinion this was only a minimal estimate of his cognitive ability, since his attentional deficits significantly interfered with measurement of his cognitive levels. In addition, Dr. LaVecchio completed the Vineland Adaptive Behavior Scales, using information provided by Ms. C. She estimated Sebastian's current communication level as at 1 year 11 months, daily living skills at 1 year 4 months, socialization at 1 year 6 months, and motor skills at 2 years 2 months. Again all of these skills were significantly compromised by Sebastian's behavioral disinhibition. (Ex S-17).

Dr. LaVecchio concluded that Sebastian's test scores were consistent with "diffuse cerebral dysfunction and severe traumatic encephalopathy." She also concluded that the test results were a minimal estimate of his cognitive abilities, owing to the behavioral and attentional interference with the testing process, as well as seizure episodes. She recommended placement in a residential program designed for children with acquired brain injuries. The primary goals should be to stabilize Sebastian's behavior through the development and implementation of a comprehensive neurobehavioral treatment plan, and to explore pharmacologic interventions, which would address his attentional deficits, while maintaining a careful balance with the anticonvulsant medication he is taking for seizure disorder. (Ex S-17, TR I-30-40).

In her view an effective behavioral management program would make it more likely that Sebastian could later participate in an academic program in a less restrictive setting. Along with goals for behavioral intervention, his IEP should focus on expressive and receptive language goals, constructional, perceptual, and graphomotor skills, ADL's, and social and peer relationships. She concluded that Sebastian's communication difficulties contributed to his behavioral disinhibition, so that it was important that he receive daily speech and language therapy, ideally in two half-hour sessions from a speech and language therapist. Placement with non-verbal peers could interfere with development of better communication skills and could result in regression of even his current language skills. (Ex S-17, TR I-30-49).

Dr LaVecchio did not believe that Sebastian's pre-injury

cerebral palsy impacted adversely on the prognosis for rehabilitation from his traumatic brain injury. She viewed Sebastian as a child of normal cognitive growth prior to his injury. She could not, however, give a definite prognosis on his potential for rehabilitation, because the current intensity of Sebastian's behavioral and attentional deficits make it extremely difficult to ascertain his cognitive levels or potential. In this regard she found that proposals in the Crystal Spring's treatment plan for teaching sign language to Sebastian, or use of augmentative communication proposed by MAB, to be totally inappropriate, because the appropriate language focus would be on normal, verbal communication. (TR I-32-41).

Dr. LaVecchio also recommended the involvement of a behavioral psychologist with experience with TBI or a clinical neuropsychologist with behavioral psychology expertise to develop an appropriate behavioral program for Sebastian, which could be monitored on a twenty-four basis. The educational program must also include cognitive therapy, which focuses on developing residual memory, compensatory memory, compensatory organizational skills, and rehabilitation of language. In addition Sebastian should receive physical therapy and occupational therapy to address his needs for improved mobility, (S-17, I-40-44).

Finally, she stressed the importance of providing training to Sebastian's Mother and other family members on implementation of his behavioral program. (TR I-32-47).

14. Dr. Mark Carper, Neuropsychologist, was hired by Lawrence to provide consultation to staff providing services to Sebastian under the Interim Educational Plan. As part of this responsibility he conducted an initial behavioral evaluation on October 9, 1991. (Ex. S-19) Dr. Carper observed Sebastian over three days in one to three hour sessions in Sebastian's home. He found that Sebastian had at least minimal comprehension of spoken language and tone of voice. He also had the ability to utilize single word utterances and short phrases within appropriate contexts. His behaviors indicating distractibility consisted largely of examining objects throughout the apartment with great curiosity, taking or grabbing objects in which he was interested spontaneously, mouthing objects, and fluctuating arousal with periods of activity alternating with periods of increased lethargy. The latter may have been related to seizure activity. He found that Sebastian did not engage in purposeful aggressive behavior. He also found Sebastian's gross motor skills to be age appropriate. (Ex S-19, TR IV-51-56).

At the time of the evaluation, Sebastian was receiving one hour sessions of individual tutoring three times a week. Dr. Carper observed that Sebastian responded very well to the one-to-one attention provided by the tutor, who used behavioral

techniques to engage Sebastian. This she was able to do for approximately 30 minutes out of the one hour tutorial, working with Sebastian on puzzlemaking, language ability, singing songs, and reinforcing gross and fine motor skills. (Ex S-19).

Dr. Carper categorized Sebastian's positive behaviors as eye contact with tutor, listening and attempting tasks with the tutor, sitting quietly between tasks about 40% of the time, repeating words and phrases, using phrases in appropriate contexts, singing with the tutor, moving his wheelchair short distances, playing independently with a toy, shaking hands with visitors. Sebastian's tutor reported that he responded well to primary reinforcers, such as food. (Ex S-19, TR IV-45-51).

Dr. Carper recommended a behavioral program consisting of the imposition of considerable amount of structure, coupled with increased academic, social, and remediation programming. He also stated that a consistent group of professionals was needed to provide services and to formulate an intensive neurobehavioral program, in his words a "bombardment" of cognitive therapy, educational therapy, and vocational programming, with extensive neuropsychological and particularly behavioral psychological involvement. In addition, he recommended training for Ms. C. and her family in developing contingency-based behavioral approach to interacting with Sebastian. He called for more educational programming -- approximately two hours per day, once in the morning and once in the afternoon, physical therapy, occupational therapy, the involvement of a neurologist to arrange prescription of medication to address attentional difficulties, and provision for close cooperation among all service providers. He recommended an interim in-home placement for Sebastian with a structured behavioral, educational, PT, OT, and neurobehavioral components. However, Dr. Carper found that a day or residential program with the same amount of structure, providing socialization with other clients, and a well-grounded cognitive and behavioral program, was necessary for Sebastian to make progress over the longer term. (Ex S-19, TR IV-58).

PROPOSED EDUCATIONAL PLACEMENTS

PARENT'S PROPOSED EDUCATIONAL PROGRAM

15. Dr. LaVecchio testified that she recommended the Pediatric Adolescent Program at Highwatch, because it was the only available residential program, specifically designed for children with traumatic brain injury, with an age-appropriate peer group for Sebastian of similarly-disabled children, and staffed by highly-trained professionals, who are experienced in addressing the educational and rehabilitative needs of children with traumatic brain injury. She also testified that Crystal Springs and MAB would be totally inappropriate for Sebastian,

because it was highly inappropriate to treat Sebastian as a retarded child and to place him in a program for severely and profoundly retarded individuals. (TR I-66-69).

In her opinion an appropriate educational program for a child with TBI, even though functioning at a very low level, is fundamentally different than one for a severely retarded child. This because the learning and development of a TBI student draws in part on residual, "splinter skills" retained by the student despite the brain injury. In the case of severely or profoundly retarded students, there is no expectation that they will progress beyond a limited functional level with little likelihood of achieving independent living skills. Thus, the educational focus is almost exclusively on daily living skills, rather than on retraining or strengthening residual cognitive skills. In addition, even though Sebastian evidences significant behavioral issues, he is not self-abusive or aggressive to the extent manifested by students, one would expect to be placed in the Behavior Disorder Unit at Crystal Springs. Dr. LeVecchio noted that Sebastian's unsuccessful placement at the Behavioral Intervention Program at LABB Collaborative, a high quality program, is an indication that even highly-skilled staff, who are experienced in implementing behavioral programs for children with multiple disabilities, may not be able to program for a child with TBI, like Sebastian. There is a difference in introducing skills to an individual with a finite capacity for learning or memory, as would be the case with a severely or profoundly retarded individual. She also stated that staff, who are trained in providing appropriate programming to TBI students, know how to address the "grief and loss," associated with the intense changes in an individual's abilities caused by traumatic injury. (TR I-41-50).

Sebastian is verbal and can be expected to make gains in the language and cognitive skills. The severely retarded students in the Crystal Springs and MAB programs have very limited to non-existent verbal skills, and hence, provide inappropriate peers for Sebastian, whose educational program should focus on developing his language and communication skills, as part of the effort to address his behavioral needs. (TR I-32-40).

The focus of the Crystal Springs and MAB programs is not on short term rehabilitation, but rather students remain in their programs for years. This is inconsistent with the goal of stabilizing Sebastian's behaviors and attentional issues, so that he can be returned to live with his mother and extended family, as quickly as possible. (TR I-41-44, I-66-68).

Lastly, it is totally inappropriate to place Sebastian, an eight year old child, in programs where the other students range in age from fourteen to twenty-two. (TR I-41-42).

16. Douglas M. Buyer, Clinical Psychologist and Coordinator of Educational Services at Highwatch, testified regarding the educational program there. Dr. Buyer supervises the teaching staff at the Highwatch Educational Center, of which the Pediatric Adolescent Program is a part. The Educational Center has been in existence for about two years. Prior to that Highwatch was primarily a rehabilitation facility. Dr. Buyer is a licensed psychologist and certified school psychologist in New Hampshire and New York. He has been at Highwatch since 1989. (Ex S-33, TR II-19-25, II-74-77).

Highwatch is approved by the State of New Hampshire as a "nonpublic" school, but it is not approved as a special education school. However, Highwatch has individual program approval by the New Hampshire Department of Education to accept up to five New Hampshire special education students, funded by their local school district. When such students are placed at Highwatch, there is an initial approval by the New Hampshire State Department of Education, but the monitoring of the students' programs is done by the sending school district. (S-40, S-41, S-42, S-49, TR II-25-29, II-72-82).

The curriculum for grades 9 through 12 is state-approved for the purpose of qualifying students for a high school diploma, however, there is no state-approved curriculum for the Pediatric Adolescent Program. The residential and clinical components have program descriptions. The school maintains copies of current inspections for health and safety and certificates of occupancy. Neither Dr. Buyer, nor Dr. Mark Alavosius, Program Director, was familiar with the rate setting process for Massachusetts or New Hampshire, and did not know, if a rate had ever been set by a rate setting entity for students placed by local school districts. Highwatch is a private for-profit corporation. (TR II-27-30, II-76-81).

Students placed by public schools have IEP's, which are implemented by the program in accordance with their terms. Currently, there are 20 students in the Pediatric Adolescent Program, from Massachusetts, New Hampshire, New Jersey, New York, and Canada. There are currently three students from Massachusetts attending Highwatch school, placed by their local school districts. One student, age 9, who was placed at Highwatch by the Boston Public Schools, is in the Pediatric Adolescent Program. He would be in the same age group as Sebastian. (Ex S-48, TR II-29-34, II-62-66, II-100-104, II-112, II-116).

The admission process for Highwatch is conducted centrally by the parent corporation, New Medico, Inc., located in Lynn, Massachusetts. A registered nurse visits the prospective client at their home. In this case, Sebastian was evaluated at his home on February 26, 1991. Parents are encouraged to visit the

program. After the central admissions coordinator makes an initial decision on admission, the program director at the Highwatch is involved and they reach an agreement on whether the admission is appropriate. Dr. Buyer, as program director, had reviewed the notes of the nurse from New Medico, Dr. LaVecchio's report, and that of Dr. Carper. From those documents he concluded that Sebastian should be admitted to the school. (TR II-29, II-34-39, II-84-87, II-93-95, II-140-142).

The Pediatric Adolescent Program has 20 students, organized into five groupings. There are two teachers, one of whom is certified in New Hampshire as a special education teacher. The other is not a certified teacher. The largest grouping of students at one time in the classroom is nine students with the special needs teacher and two direct care staff serving as teacher aides. The largest grouping for the younger students (under age 12) is five students with one teacher, and two one-on-one aides. (Ex S-48, TR II-40-44, II-122-124).

The program also employs a licensed speech and language pathologist (who also holds a New Hampshire certificate as a speech teacher), a licensed and registered physical therapist, a licensed and registered occupational therapist (who has neuro-developmental training), a health educator, who is a registered nurse, and a behavioral specialist, who has a Masters in Psychology and who is supervised by the Program Director, Mark Alavosius. There are also direct care staff, who work in the residential units and who may serve as aides in the classroom. (Ex S-32, S-49, TR II-40-44, II-60-62, II-137, III-4-9).

Highwatch provides active in-service training to all of its staff on all areas related to the education of traumatically brain injured students. The school employs a four/fifths time psychologist, Dr. Alan Christopher, to provide on-going training to its staff. On-going staff training is necessary to assist staff in understanding the causes of student's behaviors, by understanding the underlying etiology of the head injury. (TR II-44-46).

In the classroom setting, the effort is to maximize individualization of programming. Direct care staff, related service providers, and teachers work together in the classroom. In addition some students also have a one-on-one aide assigned to assist them. The initial placement recommendation from New Medico proposed a one-on-one aide for Sebastian. (TR II-52-54, II-98-103, II-106).

Of the 20 students in the program, all but two (who are in the older group of students) are verbal. They can respond to questions and spontaneously verbalize understandably. Currently, four students are under the age of twelve (one seven year old, one nine year old, two eleven year olds). Sebastian would be

placed with this younger group of students. All of the students are ambulatory. Functionally, none is above the first or second grade level, and several are at kindergarten, pre-primer or below. The lowest functioning students are working on such things as letter recognition and learning the alphabet. There is one older student who is working on naming colors, body parts, etc. In terms of math skills, some students are working on concepts of more, less, greater than. Others are at the basic K-1 level of math. In ADL's they function at around the four to five year old level, and often require prompting and assistance with ADL's, cleaning, hygiene, dressing and mealtimes. Some of the students are non-compliant, some engage in self-injurious behavior, and some are capable of being aggressive towards people and objects. Dr. Buyer stated that Sebastian would fit into the group behaviorally, but he would be in the lower quartile of the group in terms of academic functioning. He did not think that Sebastian would be isolated in terms of his functional levels, and that the peer group could provide positive role models and teaching. (TR II-48-52, II-62-64, II-86-92, II-100-104, II-117-122, II-122-127).

In Dr. Buyer's opinion, based on a review of the evaluators' reports, it was quite possible that some of Sebastian's behaviors, such as mouthing of objects is the result of the tendency of some TBI children to revert to more primitive patterns of interacting with their environment. This suggested the need for sensory motor integration or other OT interventions, as a means to reduce those behaviors, and to replace them with more typical play and gross motor activities. (TR II-54, II-68-69, II-107-109).

He also stated that the Pediatric Adolescent Program at Highwatch would be appropriate for Sebastian because management of his behavioral difficulties is a primary goal, and the behavior management program is implemented across the 24 hour-a-day program. Bringing Sebastian's behavior under better control is essential to assess accurately his functioning levels. Behavioral controls would enable Sebastian to reveal more of his actual abilities than he has thus far, especially in testing situations. In particular there appears to be a close interaction between Sebastian's difficulties in communication and his negative behaviors. Addressing his need for intensive speech and language therapy could assist in diminishing negative behaviors and enable him to progress educationally. At the same time the initial curriculum would also address Sebastian's current abilities by focusing on community skills, dressing skills, bathing skills, eating skills, and other ADL activities. (TR II-52-59, II-69-71).

The Pediatric Adolescent program has been successful in teaching the skills necessary for students to develop more positive behaviors, and in suppressing aggressive or self-

injurious behaviors, so that students are able to transition to less restrictive programs on a fairly rapid basis. Discharge planning begins as early as initial admission to the program, because the focus is on short term placement. The average length of stay is under two years, but placement is often dependent on whether a home community program can be identified, and on the extent of family involvement. Only one child has remained for as long as three years. (TR II-61-67, II-68-69, II-72-75, II-82-83, II-110, II-176-178).

17. Dr. Mark Alavosius, the Director of the Pediatric Adolescent Program, supervises the behavioral and residential component of the program. Dr. Alavosius has a Ph.D. in Psychology with a major in Educational Psychology and a specialization in applied behavior analysis. Prior to becoming Director of the program, he worked with mentally retarded and developmentally disabled children and adults in Massachusetts, serving on the staff of two educational collaboratives and also at Department of Mental Health institutional facilities for the mentally retarded. He also worked as a consultant for public school districts. (Ex S-40, S-49, TR II-129-134).

He is responsible for all clinical all programming, including speech therapy, occupational therapy, physical therapy, recreation therapy, behavioral interventions, and health education, as well as the residential clinical program. The latter consists of teaching children self-care and social skills necessary to live in a home and to be successful in their community. He is assisted by the behavioral specialist, Ms. Popma. They see that the direct care staff collect behavioral data needed to monitor students' progress in meeting their behavioral goals. (TR II-134-136).

The related services specialists work in the classroom and in the residences. For example, the occupational therapist along with the direct care staff might work on teaching students bathing and dressing skills, or the speech therapist would work on cooperative play, conversation skills, problem solving at the residences. The recreation staff train children while on outings in the community, and during community-based recreation and leisure activities. The clinicians also provide training to the direct care staff.

The direct care staff are jointly supervised by Dr. Alavosius and the residential department of the school. In the residential unit where Sebastian would live, there are eleven students with two shifts of four direct care staff during the awake hours and a third shift of three direct care staff for overnight. There are three female students, and eight boys (including Sebastian). There are weekly house meetings where students learn to communicate about the activities of the week. In the case of very low functioning students, the residence staff

would assist them in participating in the meeting. If Sebastian attends the program as he went through his day, there would be a focus on developing his expressive and receptive language skills and basic communication skills. (TR II-149, II-155-156).

There is daily communication among the educational, clinical, and residential staff to share information about individual students' progress and a formal meeting once a week. There are also record keeping systems that operate to assure consistency across environments. (II-155-156).

The behavioral specialist works full time with the pediatric population. In addition to supervision by Dr. Alavosius, the school's psychologist assists in the behavioral program. She conducts behavioral assessments. Based on that information, behavioral interventions for each student are developed. She then assists in implementing the program and in monitoring data collection used to evaluate those interventions and to suggest changes. Data is sampled for fifteen minute periods, every three hours for analysis. Ms. Popma collaborates with the health educator on medication issues and helps track the behavioral response to medication changes. If Sebastian attends the program, there would be a review of the prior assessments to learn the presenting problem behaviors that are interfering with learning. The staff then would do their own assessments in a variety of environments at the school, to see what the Sebastian's strengths and weaknesses are. Based on the data collected, they will begin to design interventions to teach effective, useful behaviors, as alternatives to the problem behaviors. Where negative behaviors may pose health or safety risks, the time-out procedures, redirection, environmental manipulation are used. Data is also collected to see how medication affects the student's behavior. For example data would be collected to see how medication affects Sebastian's ability to attend to a learning task in the classroom. Dr. Alavosius stressed the importance of careful collection of data on student's behaviors as necessary to a successful program, adding that it was possible to accomplish in the Pediatric Adolescent Program because of the consistency of staffing and constant environments. There is a twice-weekly meeting of the Director, Ms. Popma, the Health Educator and Psychologist to share information developed in implementing the behavioral program. The goal for Sebastian would be to stabilize his negative behaviors and to have a better ability to determine his actual cognitive skills. (TR II-53-55, II-60-62, II-142-146, II-148-151, II-154-157, II-182-183, III-40-44).

The program also teaches students to self-administer their medication under the supervision of the health educator. It has been possible to implement this program, even with severely impaired students, who are still able to follow one or two step instructions provided by a teacher or staff member. (TR II-62,

II-146-148, III-50-51).

Dr. Alavosius compared his experience in working with TBI children with that in working with the developmentally disabled/mentally retarded. He stated that it was very difficult to assign a functional age to the TBI students at Highwatch, because they have particular talents or "splinter skills" that stand out as unusually high in comparison to other skills. In contrast a developmentally disabled child or adult tends to have a fairly "flat" range of abilities. TBI students can have similar developmental or functional ages to mentally retarded students, but with a TBI student, pockets of higher skills will emerge. Younger TBI students will grow and go through all of the developmental milestones, while severely or profoundly retarded students' developmental experiences are likely to be delayed. Although some mentally retarded individuals would display behaviors similar to Sebastian's, they are more likely to be hypoactive, rather than hyperactive or impulsive. In the case of TBI students there is often improvement in memory deficits and they may also be taught compensatory strategies, such as checklists, memory notebooks, charts and etc. Sebastian's five years of normal development are not lost to him, although some areas will be intact and others will continue to be impaired. (TR II-164, II-170-174, II-178-180, III-56-64).

In response to questioning regarding Sebastian's reported functional level of 18 months, Dr. Alavosius stated that Sebastian would be at the low end of the peer group. However, he did not think that Sebastian would be the lowest functioning student in the program (one student, age 15, would be lower), and Sebastian would be higher functioning than others in terms of physical mobility. He also expressed his belief that Sebastian would learn from interaction with students who are further along in their recovery and who have more skills. He believed that the program would be challenging, but appropriate. Sebastian would learn, not just from his teachers and therapists, but also from interaction with other children. In contrast, he did not think that Sebastian would not do well in a peer group of 14 to 20 year old, severely to profoundly retarded students, because they would not provide a peer group with which he could engage socially. Such a placement would not provide an opportunity for Sebastian to learn how to function in a normal, rather than institutional, environment. (TR II-155-159, II-162-164, II-167-169, II-170-174, II-178-180, III-34-38, III-49-51).

17. Ms. C. testified that she has visited all three programs at issue in this case, Highwatch, MAB and Crystal Springs. Although she had no difficulty with the staff or quality of the programming at MAB or Crystal Springs, she did not see her son as belonging with the students who were placed there, because he is more verbal, more mobile, and has more potential for making progress. She expressed a fear that if Sebastian is

placed in MAB or Crystal Springs, he will not be able to transition to a day program, but will remain in a residential placement indefinitely. In contrast, she felt the students at Highwatch were similar to Sebastian, the Highwatch staff was skilled in teaching them, and placement at Highwatch would give Sebastian the opportunity to develop to be as normal as possible, and he would be able to return home in the near future. (TR III-122-162).

LAWRENCE'S PROPOSED PROGRAMS

MASSACHUSETTS ASSOCIATION FOR THE BLIND

18. Dorsey Greenfield, Director of Programs for MAB testified regarding the proposed placement. She has been director of the school for approximately four years, and with the program for fourteen years. MAB is located in Brookline, Massachusetts. The program began in 1971 in response to the need to provide education to children who were born deaf and blind as the result of the 1964-65 rubella epidemic. In 1985-86 the school began to change its focus, and now serves children, who are severely developmentally delayed and have combinations of visual, auditory, and physical impairments, as well as mental retardation. Most of the students are nonverbal and have accompanying seizures and behavioral problems. The school has had some discussions with SHIP about the modifications to the program which would need to occur in order to serve the TBI population, but those discussions are in the preliminary stages. The current staff has had some, but not extensive, experience in working with children with TBI. Currently, there are approximately twenty students in the school. Sebastian would be placed with a group of seven developmentally-delayed students, ages 14 to 22. (Ex BSEA-2, TR V-13-17, V-39-40, V-57-58, V-60, V-62-68, V-85).

The program employs three classroom teachers. One teacher is teaching under a waiver; the other two have special education certification. There is an adaptive P.E. teacher, a vocational teacher, and a music therapist. In addition there are direct care staff who work at the residence. (TR V-19-20).

Occupational therapy is offered through an outside contractor, who is a registered occupational therapist, and works at the school two times a week. Physical therapy is provided by a contracted physical therapist and by an on-staff physical therapy assistant. The physical therapist is at the school once a week. The assistant is there three times a week. Speech and language therapy is also provided by an outside contractor. The school is in the process of hiring a new speech therapist, so currently students requiring those services are not receiving them. There is an on-staff behavioral consultant, who works thirty hours a week under the supervision of the program

director. (TR V-20-22, V-61-62. V-88).

In general, the therapists set up programs for each child, which are carried out by the classroom teacher. Medical services are provided by a physician, who is at the school one day a week, and by a school nurse, who is full time. MAB does not employ a psychiatrist or psychologist. The program has an ongoing relationship with the Communication Enhancement Clinic at Children's Hospital to do evaluations, and to make recommendations for adaptive communication equipment. (TR V-22-23, V-68-69, V-88).

To address Sebastian's needs as a TBI student, the school has consulted with its school pediatrician, who has made inquiries regarding individuals who could be available to provide neuropsychological support for Sebastian. The school would be prepared to work with such an individual in providing Sebastian's program. Sebastian could continue to see Dr. Yessayan at Children's Hospital, his current neurologist. MAB would also be willing to cooperate in providing family support and training, which might be available through SHIP or another state agency. (TR V-33-34, V-47-49).

If Sebastian attended MAB, approximately one month would be spent evaluating his educational needs. The staff would assess his functioning and baseline data would be taken by the behavioral department. A physical therapy assessment would be done by the physical therapist, then a treatment plan would be developed involving an exercise program which could be incorporated into his daily routine around the building, and implemented on a daily basis by the physical therapy assistant or the adaptive P.E. teacher. Depending on what is recommended, the program could be carried out on the weekends by the classroom staff, if needed. With respect to OT., the therapist would do the initial assessment, then she would set up a program that could encompass mealtimes, adaptive equipment or aids for teaching skills, and give some attention to sensory integration needs. She would work with the teacher to make sure the plan was implemented at every opportunity throughout the day. A behavioral program would be developed, so that it could be carried out outside of school, as well as in the classroom, as part of an integrated approach. Ms. Greenfield also stated that if Sebastian's IEP called for short (half hour) periods of speech therapy twice each day, that could be provided. She did not describe what additional steps, if any, would be necessary to carry this out. Whatever communication strategy was identified would be carried out throughout the day, including time in the dormitory. The program professionals meet regularly, which can be as often as once a week, to consult about students. (TR V-18-19, V-24-26, V-42-45, V-46-47, V-86-88).

Sebastian's educational program would take place in the

classrooms with related services being provided in a pullout model. Sebastian would be part of a class of eight students. He would have a special needs teacher as the classroom teacher. Within the daily schedule, the teacher would set aside specific times for assessing cognitive skills, working on fine motor activities, and assessing skills of daily living. She would develop a regular training program to address each area that she had identified as needing further educational attention for Sebastian. Individual activities are arranged for each student, but generally speaking the same type of activity would be carried out for all of the students at a time. Physical education would take place either in the school's gym or in a community facility, such as a local "Y". The school day runs to about 3:00 p.m. with lunch in the middle. There is a one hour overlap between the end of the school day and when the instructor who is in charge of the evening shift arrives, which can be used for communication purposes. The afternoon schedule is geared more to recreation, arts and crafts and community outings, household activities and chores. One day a week the group goes on a field trip. Students return to the dormitory area about 8:00 at night. (TR V-41-41, V-51-53, V-85-88).

Sebastian would stay in a dormitory in a single bedroom. There would be awake overnight staff at night. Meals are usually eaten in the cafeteria. Groups of students do cooking at different times during the week. They also go on field trips and may have meals off grounds at times. The teaching staff go directly to the dormitory in the morning at seven a.m. to oversee wake up activities, such as dressing, bathing, toileting, toothbrushing, laundry, dressing, etc. ADL skills are worked on at appropriate times during the day, e.g., eating skills at mealtime. (TR V-30-32, V-53).

The proposed peer group for Sebastian consists of: 1) a 15 year old male, who is nonverbal and uses sign language. He's been in the program for three years. He is sometimes aggressive, self-abusive, and engages in self-stimulating behaviors. 2) a 22 year old male student, who is deaf/blind and diagnosed as mentally retarded. He is nonverbal and uses sign language. He has been in the program for fifteen years. He is sometimes self-abusive, aggressive, and engages in self stimulating behaviors. 3) a 20 year old male with a moderate to severe mental retardation. He has a variety of single words in his vocabulary. He is partially ambulatory. He has been in the program for seven years. He engages in self-stimulatory behavior and occasional aggressive behavior. 4) a 21 year old girl with a diagnosis of severe mental retardation. She is nonverbal. She has been in the program for six years. She engages in aggressive and self-stimulating behaviors. 5) is a 14 year old male, who had a traumatic head injury. He is able to speak in two to three word sentences. He has been in the program for about three and a half years. He does not exhibit many aggressive or self-abusive

behaviors. 6) a 16 year old male with a diagnosis of severe mental retardation. He is nonverbal. He has been in the program for five years. He engages in self-stimulatory behaviors, such as mouthing objects. 7) a 17 year old male with a diagnosis of severe developmental delay. He is nonverbal, but responds to directions in English and Spanish, and uses sign language. He has been in the program for a little over two years. He engages in serious self-injurious behaviors. (TR V-36-39, V-69-83, V-92-95).

Ms. Greenfield conceded that there was a significant difference in age between Sebastian and the other students, but stated that this was not unusual, because the students are functioning at a low level. In her opinion, functionally Sebastian would be in about the middle of the group. She also felt that Sebastian's behaviors were similar to behaviors presented by the school's current students. (TR V-36-39. V-83).

Ms. Greenfield stated that the goal of enabling Sebastian to make educational and behavioral progress to the point where he could be placed in a less restrictive program was a good goal, but she did not elaborate on how this goal could met at MAB. (TR V-35-36, V-54).

CRYSTAL SPRINGS

19. Diane Giunta, Agency Administrator for Crystal Springs described the proposed program at that school. Crystal Springs serves about 97 students, who have a primary diagnosis of severe to profound mental retardation and multiple handicaps. Generally the functioning levels of the students are from six months to forty-eight months. The Behavior Development Unit (BDU), where Sebastian would be placed, is a small unit that serves up to thirteen students. In addition to having a primary diagnosis of severe to profound mental retardation, these students present fairly serious behavior management issues, as the result of self-stimulatory, disruptive, self-abusive, or assaultive behaviors. The staff's recommendation for the BDU placement was made based on Sebastian's various evaluations, which in their view evidenced some assaultive behavior, distractibility, low frustration, and a lot of "out-of-seat" behavior. They determined that the program was cognitively appropriate for Sebastian, based on the described functional levels of between sixteen and twenty-six months with higher splinter skills in the area of gross motor skills. This would place Sebastian functionally at about the middle of the current BDU population. (Ex L-14, TR V-96-100, V-102, V-136).

Approximately 60 percent of the students in the BDU have some verbal language skills, ranging from single-word utterances

to two or three word phrases. Many use sign language communication. There are two students at Crystal Springs who have had TBI, but none is placed in the BDU. The current age range at the BDU is from 14 to 22. The group in which Sebastian would be placed also ranges in age from 14 to 22. (Ex BSEA-2, TR V-102-103. V-128).

The BDU is administered by a Program Director, who was formerly employed by Behavior Research Institute in Rhode Island. He does not have an academic degree. In addition to his administrative responsibilities, he is responsible for supervising the behavioral technicians. There is one certified special needs teacher, and two "trained teachers" (described in the program staff list as teaching assistants, presumably because they are not certified). In addition, behavioral technicians work in the classroom. There are two classrooms for the unit. The special education teacher is responsible for establishing the overall daily plan, for supervising the professional staff within the classroom, and for providing the direct instruction for all of the students. (Ex L-13B, TR V-103-104, V-131-132).

Occupational therapy is provided outside the school at Charlton Hospital. If a student's occupational therapy plan can be worked on in the classroom or in the residential setting, it is provided at the BDU. The typical OT skills with the BDU population focus on oral motor skills, feeding skills, and upper body issues, such as the ability to cross the midline to grasp an object. The school's speech and language staff and PT staff are involved in these types of treatments. If Sebastian's IEP called for daily OT, it would have to occur in a single segment, because he would have to be transported to Charlton Hospital to receive it. (TR V-104-105, V-106-107, V-135).

Physical therapy is provided through a consulting therapist, who is on site four days a week. In addition the program is soon to have a three-day-a-week physical therapy assistant. There are two speech and language clinicians on staff full time. Sebastian could receive speech and language therapy on site in several fifteen or twenty minutes segments. There is a full time psychologist. The school employs a consulting neurologist, a psychiatrist, and a pediatrician. There is 24 hour a day nursing service, and nurses dispense all medications. A program of medication for Sebastian would be prescribed by a consulting neurologist or physician, and administered by the nursing staff. In addition the program employs four full-time equivalent rehabilitation aides. None of the staff has any experience in the treatment or education of TBI students. (TR V-105-107, V-123, V-132).

Once a child is admitted to the BDU, he is evaluated for up-to-date functioning levels, and specific goals and objectives are developed within the setting of the program. Program staff meet

weekly. The behavioral development unit also meets separately to review the progress of each student. There are quarterly progress reviews and six month reviews to which the parents are invited. Outside professionals generally do not participate in the weekly meetings, but there may be consultation as the result of the weekly meeting. (TR V-110-112).

The school is located in a campus-like setting near Fall River, Massachusetts. The main school building houses the administrative offices, two classrooms, and three residential settings, including the BDU. There is also a recreation center, used as a gym, and outdoor recreation areas, including a farm area and petting zoo. The BDU students are housed in semi-private rooms located in the main campus building. There is a small family-style dining area with a small kitchen. Within the unit is a small socialization area for non-school waking hours. (TR V-101-102 V-112-113).

During the day there is formal classroom time from 9:00 a.m. to 2:45 p.m. The class segments are preacademic preparation, activities of daily living training, fine motor and gross motor development, and direct therapies. All students are working on the same general areas at the same time, but engaged in individualized activities. By and large the students engage in parallel activities and do not interact with each other. The student/staff ratio is one staff member to two students. ADL's are addressed in the residential setting as well as in the classroom. Exercises involving identification of objects, such as comb, brush, etc. would occur. The overall framework for the day would be based on Sebastian's behavioral management plan, which would be designed to minimize disruptive behaviors, and to reward positive behaviors that he acquires to help bring his skills to a higher level in the areas of fine motor strengthening, receptive and expressive language, etc. All BDU staff are trained in behavior management techniques, appropriate interventions, and charting of behaviors. The behavioral management techniques, which would be used are generally those set out in Dr. Carper's behavioral assessment and recommendations. (Ex S-27, TR V-114-116, V-122-126, V-141-144).

On a typical day, Sebastian would get up around seven a.m., be assisted with the morning ADL needs (bathing, dressing, grooming, toileting) by staff and would have breakfast in the unit. He would go to the school classroom at around 9:00 a.m. He would return to the residential unit between 2:45 and 3:00 p.m. Students spend some time working on ADL skills, such as toileting, change their clothes, watch television, play in the gym or go for a walk. During non-class time there are 3.2 students per staff member. (TR V-115-116, V-121-122).

The students who would provide the peer group for Sebastian would be: 1) a 21 year old male, with a diagnosis of severe to

profound mental retardation with autistic like behaviors. He has been in the school for nine years. 2) an 18 year old male with a diagnosis of developmental delay and behavior disorder, who has been in the program for two months. 3) an 18 year old male with profound mental retardation, who has been in the program for four months. 4) a 21 year old female, who has a diagnosis of severe mental retardation with ring chromosome syndrome. She has been in the school for sixteen years. 5) a 22 year old female with down syndrome. She has been in the school for ten years. 6) a 20 year old male with a diagnosis of profound mental retardation. He has been in the school a year and a half. 7) a male (no age given) with pervasive developmental delay with autistic like features. He has been in the program for a year and a half. 8) a 14 year old male with a diagnosis of severe mental retardation and conduct disorder. He has been in the school for two years. 9) a 20 year old male with a diagnosis of severe mental retardation and conduct disorder. He has been in the school for three years. 10) a 21 year old male with a diagnosis of severe mental retardation with autistic like tendencies. He has been in the school for ten years. (EX BSEA-2, TR V-137-140).

Ms. Guinta stated that the school would be willing to work with a consulting neuropsychologist, if one was identified and employed (by the parent or Lawrence), and to work with personnel from SHIP. Any training to assist BDU staff in learning about issues specific to treatment of TBI students would occur only after Sebastian began at the program, and only through the efforts of any outside professionals, employed by Lawrence or the parent to provide such training. Emotional needs surrounding the issues of "grief and loss" could be addressed through a psychiatric consultation. The school social services department works with families in providing information about the children's progress and families are encouraged to visit the school. (TR V-116-120, V-132-134).

Ms. Guinta described the overall goal of Sebastian's placement at the DBU as one of stabilizing his inappropriate behaviors, so that in a relatively short time he could move to a less restrictive learning center. In her opinion Crystal Springs' acceptance of Sebastian as a student was premised on their belief that it would only be a short term placement. She also stated that in her opinion he could benefit from an intensive program that would be consistent, because it would carry over across twenty-four hours a day, and focus on his most important needs: behavioral management, fine motor skills, expressive/receptive language skills, and toileting issues, with the express intent to return him to a less restrictive program in approximately a year. (TR V-126-128, V-146-147).

20. Dr. Carper, who is currently employed by Lawrence to provide interim neuropsychological and behavioral services to Sebastian, stated that he had reviewed the two programs being

offered by Lawrence. He was also generally familiar with the Highwatch program. In his opinion, the MAB program would not be appropriate for Sebastian, because it did not have sufficient clinical staff to implement properly an appropriate behavioral and educational program for Sebastian. He also had concerns about whether speech would be addressed, as well as with the frequency with which OT and PT would be provided, because all of these services would be provided by non-staff consultants. (TR IV-40-42)

In contrast, he recommended the BDU program at Crystal Springs. In his opinion, the program could provide the elements of an appropriate program for Sebastian. However, he also stated that owing to the BDU staff's lack of expertise in with respect to the needs of TBI students, it would be very important that there be a neuropsychologist hired to provide training to the staff on educating a TBI child like Sebastian and to provide ongoing consultation on Sebastian's treatment. He did not discuss this proposal with anyone at Crystal Springs, nor did he or anyone else present any specific plan for such training or consultation at the hearing. (TR IV-28-31, IV-32-40, IV-67-74).

Dr. Carper did not think that it was essential for Sebastian to be placed with age appropriate peers or with students with verbal skills. In his opinion Sebastian's behavioral needs were so significant that his primary interactions would be with clinicians and teachers, rather than with other students, concluding that he did not think that Sebastian would "lose significant ground" by being in the Crystal Springs peer group, which he agreed was not like Sebastian. He did not site any shortcomings with the Pediatric Adolescent Program at Highwatch, and stated that the program had the therapeutic staff to provide the needed behavioral and neuropsychological services for Sebastian. However, he did not think that it was the only program able to provide appropriate programming for Sebastian. (TR IV-37-40, IV-43-45, IV-74-86).

RULINGS OF LAW AND ORDER

I. Appropriate Education for Sebastian S.

The Individuals with Disabilities Education Act (IDEA) requires states to assure that all disabled children receive a free appropriate public education. 20 U.S.C. ss.1400(c), 1414(b)(2)(A), 1416; Roland M. v. Concord School Committee, 910 F.2d 983, 987 (1st Cir.1990); Burlington v. Department of Education (Burlington II), 736 F.2d 773, 784-85 (1st Cir.1984), aff'd, 471 U.S. 359 (1985). The substantive right to a "free appropriate public education" requires the provision of

"personalized instruction with sufficient services to permit the child to benefit educationally from that instruction, Board of Education v. Rowley, 458 U.S. 176, 203 (1982), including, when appropriate, placement in residential education programs, Kruehle v. New Castle School District, 642 F.2d 687 (3d Cir.1981).

States may chose to provide students with substantive and procedural rights which the "basic floor" laid out by federal law. Burlington II, 736 F2d at 788. Under M.G.L. c.71B, the Massachusetts special education law (Chapter 766), special needs students are entitled to a special education which assures their "maximum possible development in the least restrictive environment consistent with such goal." M.G.L. c.71B, s.2; David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir.1985). Under M.G.L. c.15. ss 1M-N, 71B, s.3, and Chapter 766 Regulation, 404.2, the BSEA hearing officer has the authority to order such educational placement as is "appropriate and consistent with Chapter 766 and the IDEA, . . . required to assure the provision of a free and appropriate public education to the child in the least restrictive environment." 603 C.M.R. s.28.0.404.2.

The parties to this case agree that Sebastian S. is a school age child with special needs, entitled to a free appropriate public education which serves to maximize his educational development in the least restrictive environment. They also agree that Sebastian suffers from the effect of a traumatic brain injury and that as a result his severe behavioral, attentional, and cognitive needs, necessitate the provision of an appropriate residential special education program, able to provide programming twenty-four hours a day. Further, the central goal of an appropriate special education program for Sebastian is to stabilize and reduce his current interfering attentional, behavioral, and seizure disorders so that he may be able to return to a less restrictive program and live at home. The parties disagree on which residential program is able to achieve these goals. Their differences reflect underlying disagreement on Sebastian's educational potential, the nexus between the cause of Sebastian's disability and type of educational strategies which must be employed, and on the importance to be attached to placing Sebastian in a program able to provide him with age-appropriate peers.

I find based on a preponderance of the evidence, that Sebastian requires a residential special education program that is specially designed to meet the needs of students with traumatic brain injury. I also find that an appropriate educational program for Sebastian must consist of the following: 1) a comprehensive neurobehavioral treatment plan with appropriate pharmacologic interventions, which will address Sebastian's attentional and behavioral deficits, and seizure disorder. The behavioral program must be structured and be implemented with the involvement of behavioral psychologist or

neuropsychologist who has expertise in the treatment of children with traumatic head injury; 2) an educational program which focuses on developing Sebastian's expressive and receptive language skills through the daily provision of speech and language therapy, and which addresses his perceptual and graphomotor skills, ADL's and social and peer relationships; 3) provision of cognitive therapy focusing developing residual memory, compensatory memory, compensatory organizational skills; 4) provision of occupational therapy and physical therapy to address his mobility needs and to assist in implementing the goals of his educational program; 5) provision of training to Ms. C. to assist her and her family in implementation of Sebastian's behavioral program.

I find that only the Pediatric Adolescent Program at Highwatch is able to implement all of the elements of an appropriate special educational program for Sebastian. All three of the proposed educational placements offer programs aimed at addressing the behavioral needs of special needs students. MAB and the BDU, however, are programs which focus on severely retarded students with overlaying behavioral needs. The MAB staff has limited experience in addressing the needs of head injured students. (One student in the peer group for Sebastian has a head injury). The staff at the BDU has none. Neither program employs a neuropsychologist or a psychologist with experience in the needs of TBI students, which is essential for the proper implementation of a behavioral program for Sebastian. Further, neither program employs full time occupational therapy staff, also required to implement a program of cognitive therapy and to assist in acquisition of ADL skills for Sebastian. Indeed, Dr. Carper testified that because of the lack of experience of the staff at the BDU with TBI students, there would have to be ongoing consultation and supervision of the program by a neuropsychologist in order to meet Sebastian's needs. If Lawrence were to hire such a consultant, and I note that they have not expressly made such an offer in their submissions thus far, staff training at the BDU would only begin after Sebastian has been placed there -- even though such a placement could only arguably be acceptable on a short term basis. Further, in the case of MAB, Dr. Carper did not think that the program could provide an appropriate program for Sebastian at all, owing to its overall lack of necessary therapeutic staff.

In comparison, the Pediatric Adolescent Program at Highwatch is specially designed to serve children, who have attentional, cognitive, and behavioral deficits stemming from a traumatic head injury. With one exception all of the students in the Pediatric Adolescent Program meet this criteria (one student is severely retarded with behavioral issues). The Pediatric Adolescent Program is directed by Dr. Alavosius a behavioral psychologist and the educational programs are directed by Dr. Buyer, a licensed psychologist and certified school psychologist. There

is a full time behavioral specialist, with a M.A. in psychology. The program also employs a full time occupational therapist, speech and language therapist and physical therapist. All of the individuals have extensive experience in the education and implementation of behavioral programs for TBI students. Further, the program employs Dr. Christopher to provide ongoing training to staff in the appropriate programming for TBI students. Significantly, even Dr. Carper, who endorsed the BDU program if significant additions were in place, found no shortcomings with the Pediatric Adolescent Program, and agreed that it was appropriately staffed to meet Sebastian's needs.

I also credit Dr. LaVecchio's conclusion that experience in implementation of behavioral programs for severely and profoundly students does not assure the capacity to provide appropriate programming for a TBI student like Sebastian. The inability of the collaborative staff at BPI, a program for multiply handicapped students with behavioral needs, to manage Sebastian's educational program, suggests strongly that specialized experience with head injured students is essential to proper programming for Sebastian.

Dr. LaVecchio and Dr. Carper stressed the importance of an integrated speech and language program to be incorporated as part of an appropriate program for Sebastian. Dr. LaVecchio concluded that Sebastian's negative behaviors could in part result from the need for enhanced receptive and expressive language skills. Both MAB and the BDU programs serve populations who are largely non-verbal or who have minimal verbal interactions with those around them, and teach signing as a primary communication technique for many of their students. Dr. LaVecchio testified that this would be inappropriate for Sebastian. The students in the MAB and BDU would not provide any opportunity for Sebastian to model appropriate communication or socialization. He would in effect be left with only the staff with whom to talk. Sebastian language needs also require daily speech and language therapy in short sessions. The MAB program currently has no speech pathologist, and when one is hired s/he will only work on a consultant basis. Conversely, the Pediatric Adolescent Program has a full time speech pathologist.

Lawrence has sought to undercut the significance of the MAB and BDU staff's lack of experience in education of TBI students and the lack of similar peers in their programs by suggesting Sebastian is so cognitively impaired that impliedly he should be viewed as severely mentally retarded. Stanley Barron of Lawrence cited the fact that Sebastian was identified as a special needs student, prior to his head injury, and possibly never cognitively normal. This appears to be contradicted by the statements in the Lowell Public Schools' IEP, which was the last one prior to Sebastian's accident. That IEP found that Sebastian's strengths were in expressive and receptive language skills and determined

that he no longer needed special education. (See Ex. S-13.)

Lawrence also cites the findings in the Spaulding and Franciscan Hospital evaluations indicating severe and permanent impairment. However, later evaluations conducted by Dr. LaVecchio and Dr. Carper suggest that Sebastian's skills, albeit severely impacted by his head injury, are stronger than those identified by Spaulding and Franciscan's. Further, Dr. LaVecchio and Dr. Carper both found that Sebastian's attentional, behavioral, and seizure disorders severely compromise the ability to determine Sebastian's cognitive potential using conventional testing methods. Neither conclude that Sebastian should be considered seriously or profoundly mentally retarded. Rather, they recommended appropriate programming to address the factors interfering with Sebastian's ability to learn and to accurately assess his cognitive and educational potential. I also found persuasive the testimony of Dr. Buyer and Dr. Alavosius regarding the attentional and behavioral reasons why Sebastian could consistently test at very low functional levels, and yet not properly be considered to be severely or profoundly mentally retarded, and that with appropriate cognitive retraining pre-existing skills, apparently lost, can be revived and compensatory strategies can be taught to address lost skills. Finally, neither Dr. LaVecchio nor Dr. Carper observed the aggressive behaviors noted in the Franciscan's or Spaulding reports.

I find the MAB or Crystal Springs programs which are aimed at teaching functional skills to severely and profoundly students are not geared to meeting the educational needs of a child, whose cognitively potential is as yet uncertain. Placing Sebastian in a program for the severely and profoundly mentally retarded would deny him the opportunity to maximize his educational potential, by in effect assuming that he cannot progress beyond his current cognitive levels. It would deny him the opportunity for socialization with peers, who can provide appropriate language role models, and, thus, provides no opportunity for him to improve his receptive and expressive language skills. Dr. LaVecchio testified that placing Sebastian with the severely and profoundly retarded students was grossly inappropriate, and could result in regression, rather than educational progress. Indeed, even Ms. Guinta from Crystal Springs suggested that the Crystal Springs placement could only be appropriate for Sebastian on a short term basis to stabilize his behaviors. Yet there was nothing in the description of the program or peer group at the BDU which indicated students placed there were able to transition to less restrictive placements in short periods of time, whereas the express goal of the Highwatch program is rapid transition to community-based programming.

Equally disturbing is the fact that if Sebastian were to attend MAB or the BDU programs, he would be in programs with students who are significantly older chronologically. With the

exception of one student, who is 14 years old, all of the students in the BDU are 18 or older. Similarly, the students in the MAB program range in age from 14 to 22. Under the IDEA a free appropriate public education is one which not only provides appropriate special education and related services, but which "meets the State's educational standards, [and] approximates the grade levels used in the State's regular education. . . ." Board of Education v. Rowley, 458 U.S., at 203, citing 20 U.S.C. s.1401(a)(18)(C). Similarly, the Department of Education in its Chapter 766 Regulations specifies limitations on age-span for students placed in substantially separate classes (502.4 prototype) and separate schools (502.4i). Absent a specific waiver from the Department the age span cannot exceed 48 months (four years). 603 C.M.R. s.28.0.502.4(b). This reflects a Department educational judgment that even special needs students who are not receiving the majority of their education in mainstream classes should still be educated with their age appropriate peers. Although there is a waiver provision, there is no suggestion that classes for severely disabled students are excluded from the protection of this regulation. In contrast in the MAB and BDU programs proposed by Lawrence, the age span would be thirteen years with the next youngest student being six years older than Sebastian! I find the argument made by Lawrence that this enormous age differential is irrelevant, because the functional ages of the students in the program range from 6 - 10 months to 48 months, unpersuasive.

There was no testimony that this enormous age range was educationally or developmentally sound, only that it was not "unusual"(?). In fact, Dr. LaVecchio and Dr. Alavosius testified that Sebastian can be expected to go through the normal developmental milestones associated with his chronological age. Yet if he were placed at MAB or in the BDU, he would have no other students like him. Even Dr. Carper, who discounted the importance of placing Sebastian with like peers, could at best state that Sebastian would not "lose significant ground" in such a placement. Lawrence's position implies that because Sebastian is severely disabled, he may legally be denied the opportunity to be educated with his same age peers, thus denied a right available to non-disabled or less-disabled children, simply because the only available approved special education programs do not serve children of his age. It is not sufficient under state and federal special education laws to find that a student will not lose ground, rather he is entitled to maximum feasible benefit. Further, this position appears to constitute discrimination on the basis of severity of handicap in violation of Section 504.

The First Circuit Court of Appeals in Timothy W. v. Rochester, N.H. School District, 875 F.2d 954 (1st Cir.1989), held that Congress' express intent in enacting the IDEA was to assure access to appropriate education for even the most severely

handicapped students, and that the statute must be construed broadly and flexibly, so as to meet the unique needs of those students. Placing Sebastian in the BDU or MAB programs would be contrary to his rights under the IDEA or Chapter 766.

II. Placement in an Unapproved School

20 U.S.C. s.1413(a)(4)(B) provides that when children with disabilities are "placed in or referred to [private schools] by the State or appropriate local educational agency as the means to carrying out the requirements of the [IDEA] . . . the requirements of [Part B of the IDEA] and any other applicable law requiring the provision of special education to all children with disabilities within such State [shall apply, and]. . . such schools and facilities shall meet standards that apply to State and local educational agencies and that children so served have all the rights they would if served by such agencies." The Massachusetts Department of Education (Department) has established criteria for the approval of special education programs in regulation. See, 603 C.M.R. s.18.00. Both MAB and Crystal Springs are approved pursuant to these provisions. Nevertheless, the Department contemplates that there may be atypical situations where a child with special needs requires the provision of special education in a private program that has not been approved under the Department's regulations. Accordingly, the Chapter 766 Regulations set out two mechanisms for state authorization of such a placement: the first is the sole source procedures, which enable a public school to seek Department approval of a day or residential placement in an unapproved program; the second, is Regulation 404.4, which authorizes a BSEA hearing officer to determine that a "waiver [from the private school approval] provisions is essential in order to assure the provisions of a free appropriate public education for the child. 603 C.M.R. ss.28.0.404.4, 28.0.503(b).

It is undisputed that Highwatch is not approved by the State of New Hampshire, however, in all significant respects it meets the criteria for approval under the Department's sole source of care criteria. First, although not approved as a private special education school, Highwatch is approved by New Hampshire to receive up to five special education students placed by local education agencies in New Hampshire. By implication New Hampshire has determined that at least under certain circumstances Highwatch can provide special needs students with appropriate special education. Similarly, at least one student has been placed in the Pediatric Adolescent Program by a Massachusetts public school district, presumably under the sole source of care provisions. In addition, Highwatch is approved as a regular private school. Thus, New Hampshire Department of Education has concluded that Highwatch is a school, as well as a rehabilitation facility.

Secondly, the services for which placement is sought in the Pediatric Adolescent Program are special education and related services covered under the IDEA. The students who attend the program suffer from traumatic brain injury and related disabilities, and therefore, are disabled students under the IDEA. This is not a case where a student is seeking placement in a private school that provides regular education.

Finally, the staff of the Pediatric Adolescent Program are adequately qualified. The educational program is directed by Dr. Buyer, a licensed psychologist and certified school psychologist, and has a certified special education teacher with an uncertified teacher for twenty students. They are assisted in the classroom by direct care staff, serving as aides. In addition, all of the related service staff -- Program Director, Behavior Specialist, occupational therapist, physical therapist, speech and language therapist, health educator (nurse), and psychiatrist are appropriately licensed or registered. (Compare this with the BDU, which has one special education certified teacher, two uncertified teachers and a program director who has no academic degrees.) Further, unlike either MAB or Crystal Springs, all of the service providers needed to implement Sebastian's program are trained in the education of traumatically brain injured students and are on the resident staff of the school.

For all of these reasons based on the preponderance of the evidence presented to me in this hearing, I conclude that neither the MAB, nor Crystal Springs (BDU) programs are able to provide Sebastian with a free appropriate public education able to maximize his educational development in the least restrictive environment. I also conclude that the Pediatric Adolescent Program at Highwatch, Inc. in New Hampshire is able to provide an appropriate special education to Sebastian, and that his placement in Highwatch is essential in order to meet his special educational needs. Therefore, pursuant to my authority under 603 C.M.R. s.28.00.404.4 and s.28.0.404.5, I order the Lawrence Public Schools to immediately reconvene the TEAM to write an IEP for Sebastian incorporating the findings of this decision, in particular providing for his placement in the Pediatric Adolescent Program at Highwatch, Inc., and to make immediate application for Department approval for Sebastian's placement.

III. Lawrence's Motion to Reopen -- Current Status of New Medico Inc.

On March 30, 1992, two days prior to issuance of this decision, counsel for Lawrence filed a Motion to Reopen the Record of the Hearing, based on recent (March 29, 1992) newspaper articles, regarding the convening of a grand jury to investigate New Medico, Inc., the parent corporation of Highwatch, Inc., and setting out allegations about mismanagement of patient care at

some of New Medico's facilities. Highwatch was not mentioned. (See, Ex BSEA-3, attached hereto as Appendix 1.) Owing to the length of time which has passed since completion of the hearing and closing of the record in this case, and the fact that Sebastian is receiving only those services provided under the interim agreement, I have concluded that it would not be appropriate for me to delay issuing a final decision, pending the uncertain outcome of such an investigation. Accordingly, I deny the School's motion, and issue this decision as the final BSEA decision in this matter.

Nevertheless, I am cognizant that financial mismanagement or failure to provide services to clients for which an insurer or public education agency has been charged could cast doubt on the willingness or ability of a subsidiary corporation of New Medico, like Highwatch, to provide the services called for in Sebastian's IEP. Therefore, upon request of either party, I will convene a compliance hearing pursuant to Section 407.0 of the Chapter 766 Regulations to consider facts bearing on the ability of Highwatch to implement the program ordered in this decision, or which might serve to excuse compliance by Lawrence with this decision. Upon completion of such a hearing, I will determine what remedy, if any is appropriate, including, if the evidence so warrants, the ordering of another program placement able to assure that Sebastian's free appropriate special education. Either party may make such a request at any time during the implementation of the educational program ordered under this decision. 603 C.M.R. s.28.0.407.0.

By the Hearing Officer

Arsten Reasoner App

Date: April 1, 1992

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: RUDOLF S.

BSEA # 91-2105

RULING ON STUDENT'S MOTION
TO DISMISS AND MOTION IN
LIMINE, AND NEW MEDICO'S
MOTION TO QUASH SUBPOENA

This matter comes before the Bureau of Special Education Appeals (BSEA) pursuant to the Lawrence Public Schools' Motion for a Compliance Hearing regarding the April 1, 1992 decision in this case, under the provisions of Paragraph 407.0 of the Chapter 766 Regulations (603 C.M.R. s.28.0.407.0). The April 1, 1992 decision ordered the Lawrence Public Schools to place Rudolf (known as Sabastian) S. in the Pediatric Adolescent Program at Highwatch Inc., a private school located in Epping, New Hampshire. Highwatch is not approved as a private special education school, although it is approved by the State of New Hampshire, as a regular private school and as a rehabilitation facility. On April 15, 1992, Lawrence appealed from the decision and also requested a Compliance Hearing before the BSEA. (Motion Hearing (MH) exhibit (Exh.) MH-1). Lawrence's Motion did not specify the basis for its request for a Compliance Hearing, however, a Statement of Issues filed by Lawrence on May 15, 1992, stated that the issue to be decided at the Compliance Hearing was "whether Highwatch will effectively or properly implement the special education program ordered for Rudolf S." (Exh. MH-8)

Pursuant to the agreement of the parties' a Pre-hearing Conference and Motion Hearing was held at the BSEA offices on May 21, 1992. At that time the parties filed written submissions and were given the opportunity for oral argument on two motions: Student's Motion to Dismiss the Compliance Hearing, or in the alternative, Motion in Limine; and New Medico's Motion to Quash the Subpoena Duces Tecum, issued at the request of the Lawrence Public Schools. Appearing at the proceeding were Michael Bearse, Counsel for Lawrence Public Schools, Jane T. Ellis, Counsel for the Student/Parent, Ms. Barbara Gannon, Advocate from Children's Law Project, and Barbara Gilmore, Counsel for New Medico, Inc. (Ms. Gilmore appeared solely for the purpose of arguing New Medico's Motion to Quash. New Medico is not a party to the proceeding before the BSEA.) This ruling addresses these motions.

STUDENT'S MOTION TO DISMISS THE COMPLIANCE HEARING

The student argues that Lawrence has not properly requested a Compliance Hearing within the requirements of Section 407.0 of the Chapter 766 Regulations. That provision states that:

. . .[A] party may file a motion with the Bureau contending that the decision of the Bureau is not being implemented and setting out the areas of alleged non-compliance. The hearing officer may convene a hearing at which the scope of the inquiry will be limited to the facts bearing on the issue of compliance, facts of such a nature to excuse performance, and facts bearing on a remedy. Upon a finding of non-compliance, the hearing officer may fashion appropriate relief. . . .
603 C.M.R. s.28.0.407.0.

The student contends that Lawrence has not set out specific areas of non-compliance in its motion, and its Listing of Documents and Statement of Proposed Issues (Exh. MN-8) refer to matters that are irrelevant to the question of whether the program at Highwatch ordered in the April 1, 1992 decision is in fact being implemented.

In response, Lawrence makes specific reference to the April 1, 1992 decision in which its motion to reopen the hearing to take evidence concerning various newspaper allegations pertaining to New Medico was denied. In that decision, I stated that I recognized "that financial mismanagement or failure to provide services to clients for which an insurer or public education agency has been charged could cast doubt on the willingness or ability of a subsidiary corporation of New Medico, like Highwatch, to provide the services called for in Sabastian's IEP," and stated that either party could request a compliance hearing to consider "facts bearing on the ability of Highwatch to implement the program ordered in the decision, or which might serve to excuse compliance by Lawrence with [the] decision." Lawrence proposes to introduce documentary evidence of the following nature: 1) An affidavit of a parent (Janis H. Wolpin), who placed her 26 year old daughter in the Highwatch rehabilitation program in 1988, and who moved her daughter to another facility approximately 18 months later, citing various inadequacies with her daughter's program/treatment at Highwatch; 2) a court complaint filed in New Hampshire by a former employee of Highwatch, Ronald Witham, terminated as a security guard in September 1989; 3) three court complaints involving nursing homes owned by New Medico, but not associated with Highwatch; 4) two newspaper articles involving a federal grand jury probe of New Medico, in which Highwatch is not mentioned; 5) statements of various witnesses in a federal Congressional hearing involving the issues of licensure of facilities for head injured patients, again with some mention of New Medico, but not Highwatch.

Lawrence also proposes to call Ms. Wolpin to testify further regarding the information presented in her affidavit. In oral argument Lawrence stated that it has no evidence regarding Sabastian's current program at Highwatch, nor any other information regarding Highwatch, itself, except to the extent that such information might be adduced pursuant to the subpoena (see discussion below).

Rather, Lawrence argues that because the BSEA ordered Sabastian placed in an unapproved facility, which was not regulated by the Massachusetts Department of Education or by the Division of Purchase Services, the hearing officer has an obligation to perform what is in effect a regulatory role relative to Highwatch and New Medico. Under this view complaints about the general management and business practices of New Medico would be relevant to this regulatory responsibility. Therefore, the documentary evidence described above and that sought through the subpoena duces tecum is relevant and within the scope of a compliance hearing.

I do not accept Lawrence's contention that the compliance hearing includes within its scope all issues which might be raised regarding the operation and business practices of Highwatch and New Medico. My role as hearing officer is not to address questions which would only be relevant if this were a licensure proceeding involving Highwatch. Ordering the placement of a student at Highwatch does not turn the BSEA into a licensing authority. Rather, the purpose of a compliance hearing is to determine if Sabastian is receiving the special education program ordered in the decision. If he is not, and the reason he is not, is the result of failure of Highwatch to deliver the services that were represented to be available at the time of the hearing, or that are set out in the IEP written by Lawrence pursuant to the decision, then a remedy which assures Sabastian of an appropriate special education placement will be ordered. In my view these questions can be addressed without a sweeping inquiry into the entire operation of Highwatch or New Medico. Similarly, Lawrence may not use the compliance hearing as a means to reopen the entire question of Highwatch's suitability as a placement for Sabastian. That matter has been finally adjudicated, and Lawrence's judicial appeal of that decision is currently pending.

Nevertheless, I am reluctant entirely to preclude Lawrence from having the opportunity to present evidence, which it contends casts doubt on Highwatch's ability to implement Sabastian's special education program. Therefore, I am denying the student's Motion to Dismiss, but I am granting his Motion in Limine. Evidence admitted at the Compliance Hearing will be limited to that directly bearing on Highwatch's present ability to implement Sabastian's program. Lawrence may present documentary or live testimony from individuals who do not have current knowledge of Highwatch, only to the extent that such

evidence can be shown to be relevant to current operations at the school, particularly as it pertains to the Pediatric Adolescent Program, where Sabastian is placed.

MOTION TO QUASH THE SUBPOENA DUCES TECUM

On May 6, 1992, Lawrence requested the BSEA to issue a subpoena duces tecum to Jeffrey Goldshine, President of New Medico, Inc., in Lynn, MA, which is the parent corporation of Highwatch. (Exh. MH-2). The subpoena was issued by the BSEA on May 8, 1992. (Exh. MH-3). It required Mr. Goldshine to produce an extensive listing of documents believed to be in the possession of New Medico. Mr. Goldshine did not appear at the pre-hearing conference, nor were the requested documents produced. Rather, New Medico contended that the subpoena duces tecum was improperly served, and that in general the documents requested were overly broad, unduly burdensome, and unrelated to the proceedings before the BSEA.

As set out above Lawrence contends that the documents set out in the subpoena duces tecum are relevant to the general business practices, client admissions policies, and personnel practices of New Medico and/or Highwatch and should be within the purview of the BSEA compliance proceeding. Briefly described, the subpoena duces tecum calls for the following documentary items: 1) personnel files and complaints filed by Ronald Witham; 2) any complaints regarding use of drug and alcohol by employees at Highwatch or the existence of dangerous vehicles; 3) documents pertaining to any legal actions against New Medico or Highwatch regarding fraud and abuse; 4) all documents pertaining to licensure of Highwatch, New Medico or any other entity owned by Highwatch; 5) policies related to payment of bonuses for client admissions; 6) policies on length of stay at New Medico, Highwatch, or any other facility owned by New Medico; 7) manuals on admission of patients to New Medico facilities; 8) all reports on individual therapy sessions of patients at Highwatch and number of clients treated; 9) documents pertaining to the hiring, termination, and qualifications of staff at Highwatch; 10) documentation regarding the length of stay for clients of New Medico, Highwatch, or any other facility owned by New Medico for medicaid/medicare patients; 11) documents regarding length of stay of clients of the same facilities who have private insurance; 12) policies on the use of control or restraint. The time frame for the documents was to be 1982 to present.

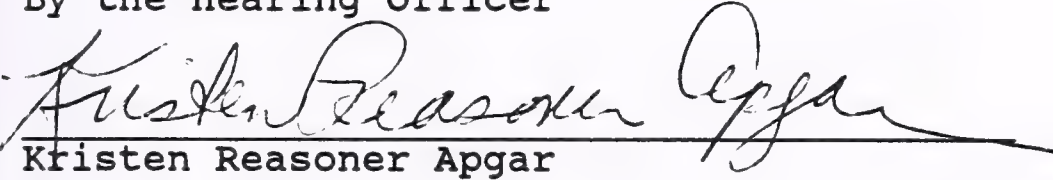
The scope of the subpoena duces tecum presumes a sweeping inquiry by the BSEA into the affairs of New Medico and Highwatch. It calls for numerous documents, some of which may not exist; some of which, such as therapy notes and personnel files, raise issues of confidentiality rights of employees and clients of New Medico and Highwatch, some of which, such as those documents

pertaining to Highwatch's licensure status are already part of the record, and many of which appear to be unlikely to relevant to the scope of inquiry in the compliance hearing. Thus, I find that the scope of the subpoena duces tecum is unduly burdensome to New Medico. Accordingly, I grant New Medico's Motion to Quash. However, Lawrence may, if it so chooses, seek to subpoena those individuals and documents, which are likely to be admissible under the limited scope of the Compliance Hearing, as set out above.

RULING

Student's Motion to Dismiss is DENIED. Student's Motion in Limine is GRANTED, as set out above. New Medico's Motion to Quash is GRANTED.

By the Hearing Officer


Kristen Reasoner Apgar

Dated: June 3, 1992

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: RUDOLF S.

BSEA # 91-2105

RULING ON STUDENT'S
OBJECTIONS TO ADMISSION
OF DOCUMENTS

This matter comes before the Bureau of Special Education Appeals (BSEA) pursuant to Student's objections to the admission of various documents offered by the Lawrence Public Schools in support of its position in the Compliance matter before me. On June 3, 1992, I denied Student's Motion to Dismiss Lawrence's request for a Compliance Hearing, but granted Student's Motion in Limine, ruling that "evidence admitted at the Compliance Hearing [would] be limited to that directly bearing on Highwatch's present ability to implement Sebastian's program."

Following receipt of my ruling that parties requested that the Compliance matter be decided solely on documentary evidence submitted by the parties, subject to each parties' right to object to the admission of documents, which ought to be excluded by the hearing officer. Paragraph 404.1(h) of the Chapter 766 Regulations authorizes BSEA hearing officers to issue decisions upon written submissions without hearing at the request of the parties. 603 C.M.R. s.28.00.404.1(h). The parties completed filing of the documents which they proposed to submit in this matter as of June 6, 1992. They were given until June 12, 1992 to file objections to the admission of any documents offered by the opposing party. The student objected to the admission of all of the documents offered by Lawrence. Lawrence did not object to the admission of any of the student's documents, but filed argument in support of the admission of its proposed documentary evidence.

Lawrence proposed documents are as follows: 1) An affidavit of a parent (Janis H. Wolpin), who placed her 26 year old daughter in the Highwatch rehabilitation program in 1988, and who moved her daughter to another facility approximately 18 months later, citing various inadequacies with her daughter's program/treatment at Highwatch; 2) a judicial complaint filed in New Hampshire by a former employee of Highwatch, Ronald Witham, terminated as a security guard in September 1989; 3) a judicial complaint filed in Bristol County Superior Court in Massachusetts pertaining to the New Forest Nursing Home by Linda Pacheco, a parent who placed her son in the nursing home. New Forest

Nursing Home is owned by New Medico, Inc., but not associated with Highwatch; 4) a judicial complaint filed in Suffolk County (Mass.) Superior Court regarding Pioneer Valley Nursing Home. Pioneer Valley is owned by New Medico, Inc., but not associated with Highwatch; 5) a newspaper article titled, "Lynn Head Injury Chain Hit with Suit for Fraud," Boston Herald, April 3, 1992. The newspaper article describes a grand jury investigation into New Medico, but does not mention Highwatch; 6) a newspaper article titled, "Care of Brain-Injured Draws Fraud Charges," New York Times, March 16, 1992. The article describes concerns about some nursing homes owned by New Medico. Highwatch is not mentioned; 7)-11) statements of various witnesses in a federal Congressional hearing involving issues relating to the lack of regulation of facilities for head injured patients, again with some mention of New Medico, but not Highwatch.

The student argues that the documents should be excluded on the following grounds:

1) Janis Wolpin affidavit. The student objects that the document is not relevant to the scope of the BSEA Compliance hearing as it does not relate to the Pediatric Adolescent Program, or its current operations, and it involves an adult patient in the rehabilitation program, not the school programs.

2) Ronald Witham complaint. The student objects that the document is not relevant to the current operations of the Pediatric Adolescent Program.

3) - 11) The student objects that the documents are not relevant because they contain no information regarding Highwatch or the Pediatric Adolescent Program.

Lawrence contends that the documents are admissible because they "cast serious doubt on the financial and programmatic integrity of the New Medico system in general and in some instances of Highwatch in particular." It also argues that my ruling of June 3, 1992 unduly narrowed the scope of the Compliance Hearing and was inconsistent with the decision of April 1, 1992, where I stated that:

I am cognizant that financial mismanagement or failure to provide services to a client for which an insurer or public education agency has been charged could cast doubt on the willingness or ability of a subsidiary corporation of New Medico, like Highwatch, to provide the services called for in Sabastian's IEP. Therefore, upon request of either party, I will convene a compliance hearing . . . to consider facts bearing on the ability of Highwatch to implement the program ordered in this decision, or which might serve to excuse compliance by Lawrence . . .

Lawrence's argument misconstrues the appropriate focus of a compliance hearing and intent of the decision. Evidence of financial mismanagement or failure to deliver required services could be relevant to ability to implement a student's IEP, however, they are relevant only to the extent that they have direct bearing on the ability of Highwatch to implement Sabastian's individual special education program. The documents offered by Lawrence provide no evidence regarding Sabastian's program, and only two documents -- the Wolpin affidavit and the Witham complaint pertain to Highwatch at all. However, in order to accord Lawrence a full opportunity to articulate the basis for its argument regarding the ability of Highwatch to implement Sabastian's IEP, I overrule the student's objection to the admission of the Affidavit of Janis Wolpin (now to be identified as Lawrence's Exhibit L-1) and the Complaint of Ronald Witham (Exh. L-2). Student's objections to the remaining documents offered by Lawrence for admission are sustained, as those documents are not relevant to the ability of Highwatch to implement the special education program ordered by my April 1, 1992 decision.

The parties will have until June 29, 1992, to file any written argument they wish to submit in support of their positions with respect to this Compliance matter.

By the hearing officer

Kristen Reasner Appa

Date: June 15, 1992

4/12/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

RE: JILL P.

BSEA #92-0163

DECISION

This decision is written pursuant to 20 U.S.C 1401 et seq., Section 504 of the Rehabilitation Act of 1973, M.G.L. chs. 30 A, 71B and the Regulations promulgated thereunder.

A hearing in the above-noted matter was convened on December 9, 1991 in Quincy, MA and thereafter on December 18, 1991, January 6, 7, 21 and February 10, 1992¹ in Holliston, MA.

The following persons were in attendance for all or part of the proceedings:

Jane P.	Parent
John P.	Parent
Charles Vander Linden	Attorney for Parents
Margaret Reed	Administrator of Special Education -Holliston Public Schools (hereafter HPS)
Mary Ellen Sowyrda	Attorney, HPS
Robert Edson	Chairperson, HPS
Leslie Codianne	Special Needs Teacher, HPS
Barbara Sugrue	School Psychologist, HPS
Antoinette Jurado-Hilton	Speech/Language Pathologist, HPS
Gail Burke	Language Arts Teacher, HPS
Mary Joyce	Reading Teacher, HPS
Elizabeth Mack	Independant Evaluator
Marie Riley	Principal, HPS
Deborah Awerman	Carroll School
Robert Kemper	Independent Evaluator
Eloise White	Neuropsychologist
Reece Erlichman	Hearing Officer

ISSUES PRESENTED

Does the 1991-92 IEP proposed by HPS for Jill P. (Exh. S-1), calling for her placement in a 502.2 prototype program at the

¹Note: By agreement of the parties the record remained open for submission of closing memoranda to be postmarked no later than March 6, 1992. The record was closed on March 10, 1992 upon receipt of said memoranda by the BSEA.

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Holliston Middle School, serve to assure her maximum feasible educational development in the least restrictive environment consistent with that goal?

In the event that it does not, does the Carroll School program meet said standard?

PROFILE/EDUCATIONAL HISTORY (Refer, e.g. to testimony Dr. Reed, Mr. and Mrs. P.; Exhs. S-8, S-2, P-8.)

Jill P., age 13, has consistently been described by experts as a socially appropriate, polite, highly motivated, persistent student, whose cognitive ability falls within the average range. She is further noted to present with language/learning disabilities which impact upon both the academic and social spheres. These disabilities include difficulty in processing language, organizing and integrating complex verbal and visual information, dealing with information which is not concrete and requires inference, word retrieval and memory. Moreover, her performance is characterized by an extremely slow pace.

Jill's educational history may be summarized as follows. She commenced in attendance as a kindergarten student in the HPS system in September 1984. She received special education services within said system, pursuant to a diagnostic IEP drafted in October 1984. During the second half of academic 1984-85, Jill was placed at the Project Accept Collaborative, which she attended for the duration of that year and the following two years (i.e., through academic 1986-87). She thereafter attended Learning Prep (as a publicly funded student) for grades three and four (academic 1987-88, 88-89)². [See, eg. Exh. S-18.] Jill commenced in attendance at the Carroll School (again as a publicly funded student) in academic 1989, and remains in said program to date. (Note that her attendance at Carroll this year is pursuant to her last accepted IEP, to wit, the 502.5 prototype plan for 1990-91, see Exhs. S-14, S-15; see also Exhs. S-16, 17, P-11, P-12.)

The 502.2 prototype IEP proposed for Jill for 1991-92 was drafted by Holliston in May 1991 and re-affirmed in a November 1991 re-convening of the TEAM to consider the results of parents' independent evaluation. (See Exhs. S-1, S-7, S-9, S-10.) This plan calls for Jill to participate in an integrated program within the Holliston Middle School, entailing the following components: Integrated Language Skills, Language Arts, Science, Social Studies and Reading classes, each daily; integrated support daily; small group language therapy - twice weekly; language consult - once weekly; summer transitional services

²Note that as per Mr. P. parents secured after school Orton-Gillingham services for Jill during her tenure at Learning Prep.

(through the Wilson Center Program); consultant services to ensure successful re-entry into the public school. Specific recommendations in the areas of language based support, perceptual needs, organizational/study skills and written expression are further incorporated in the IEP. (See Exh. S-1; refer also to testimony of Ms. Codianne, Ms. Edson.)

Statement of the Evidence

1. In January, 1989, Jill underwent a multi-disciplinary evaluation at Childrens Hospital Medical Center (Exhs. P-8, S-13). Results and findings may be summarized as follows:

Neuropsychological Evaluation - Normal intellectual potential, difficulty with organization and complexity, integrating information, and expressing what she knows in an organized fashion; likely to become overwhelmed and confused in situations where she must process and integrate complex or abstract information, or where auditory information requires contextual appreciation. Recommendations include a highly structured learning environment providing individualized support, which is relatively free of distraction and in which Jill is taught how to see the underlying structure in complex material, and how to impose structure on her own productions.

Neurology Report - Mildly distractible; evidences neurologically mediated learning disabilities, particularly with compromised subcortical and left hemisphere brain systems affecting language and tempo of performance.

Mathematics - Delayed achievement (skills at late second/early third grade); when faced with multiple elements or competing cues has difficulty focusing and integrating. Recommendations include a structured, personalized instructional opportunity where attention, language, and organizational integration supports are available.

Psychological - No primary emotional problems, age appropriate social skills; however sensitivity to academic/school related difficulties are evident which could potentially affect self-concept.

2. In September 1989 Jill was seen by Deborah Harrison for a speech and language evaluation. Ms. Harrison found Jill to have language difficulties characterized by delays in vocabulary and word relationships, processing new, lengthy or complex information, weak organization for oral narratives, and confusion with temporal sequential concepts. Speech and language therapy was recommended.

3. Margaret Reed, Administrator of Special Education, HPS, testified regarding Jill's educational history as well as the procedural history of this case. (Refer to Preliminary

Statement, supra). Dr. Reed further presented her opinion as to the validity and credibility of Elizabeth Mack's evaluations and recommendations, indicating in part that Ms. Mack does not have a Masters degree, uses a scatter-gun approach to testing, evidences a sameness in her written reports, and repeatedly uses the same testing instruments without allowing sufficient time intervals between administrations.

Dr. Reed further testified that, in deference to the expertise of her TEAM, she endorses the proposed IEP as appropriate to address Jill's needs.

4. Leslie Codianne (M.Ed.; certified generic special consultant) is a special needs teacher in the integrated program at the Holliston Middle School. She performed an educational evaluation of Jill in the spring of 1991 (Exh. S-2), observed her at the Carroll School (in April and November, 1991), and was a member of her TEAM.

Pursuant to the April evaluation conducted by Ms. Codianne the Woodcock Johnson Psycho-educational battery - Revised was administered to Jill, including seven standard subtests of the cognitive battery and the achievement battery. The following chart reflects Jill's scores on this battery (Note: Jill's actual grade was 6.7):

<u>Cognitive Battery</u>	<u>Grade Equivalent</u>	<u>Percentile</u>
Incomplete words	2.4	6th
Memory for Names	K.0	2nd
Memory for Sentences	10.2	74
Visual Matching	6.9	54
Visual Closure	6.6	50
Analysis Synthesis	5.5	38
Picture Vocabulary	6.3	45
<u>Achievement</u>		
Letter/Word ID	7.1	56
Passage Comp.	6.9	50
Math Calculations	8.3	78
Applied Problems	5.4	33
Dictation	4.9	25
Written Expression	16.9	99.9
Science	3.8	19
Social Studies	4.8	22
Humanities	3.2	15
Broad Reading	7.1	54
Broad Math	6.9	54
Overall Knowledge	3.9	14
Overall Skills	5.9	38

[Note that the subtest grade equivalent scores of 2.4 and K.0,

on incomplete words and memory for names, respectively, were omitted on the evaluation report; they do however appear on the computer print-out, Exh. S-22.]

In summary Ms. Codianne found that Jill was a self-motivated, diligent student demonstrating a slow, deliberate method of solving tasks (delays in response time were noted throughout testing). Strengths were found to lie in perceptual speed and short term memory, accounting for her preferred multi-modal, visual/concrete learning style. Difficulties were evidenced in long-term memory, auditory processing, and receptive and expressive language skills, which difficulties impact on easy mastery of content subjects. Numerous recommendations for support and modifications in educational programming were made with regard to language based support (allocation of additional time to respond, work on compensatory strategies, etc.), visual perceptual needs, organizational/study skills, and written expression. (See Exh. S-2 for specifics.)

Based on her testing Ms. Codianne differed with Ms. Mack's findings (infra), assessing Jill's needs as less severe than did Ms. Mack, and further disagreed with Ms. Mack's characterization of her as distractible and perserverative.

Ms. Codianne testified regarding the integrated program proposed for Jill, indicating generally that it represents an extremely structured educational environment employing a multi-sensory, sequential, interdisciplinary approach. It is comprised of regular and special needs students³, and is team taught by regular and special education staff. Within the team teaching model the regular education teacher serves as the subject matter expert and the special education teacher provides input on curriculum presentation, methods of evaluation, modifications, teaching strategies, alternative testing procedures, etc. Frequent, regularly scheduled interdisciplinary planning and coordination meetings are held.

Jill's schedule, were she to attend the Holliston program, is illustrated by the following grid:

1. Integrated language skills - 5x/week, 26 students (20 of whom have special needs); team taught by Ms. Codianne (primary teacher) and regular education staff person. Subject matter consists of organization/study skills, strategies, pre-viewing, outlining, word banks; homework sheets; utilizes Project Read;

2. Integrated Language Arts - 5x/wk, 27 students (16 of

³ many of whom are language disabled, testing at levels below Jill's on the Woodcock-Johnson. (See Exh. S-19.)

whom have special needs); team taught by Ms. Codianne and Ms. Burke;

3. Integrated Science - 5x/wk, 24 students (15 of whom have special needs); team taught; curriculum entails a great deal of hands-on work;

4. Basic Math - 5x/wk; mainstream course; majority of students have special needs, an aide is present three days per week; (note: math assistance is available in support setting);

5. Academic support - 5x/wk; maximum of 12 students (but actual number varies); taught by Ms. Codianne with the assistance of an aide (who is a certified teacher); entails remediation, reinforcement of content work, organizational and study skill techniques;

6. Integrated Social Studies - 5x/wk, 25 students (12 of whom have special needs) team taught;

7. Integrated Reading - 25 students (15 of whom have special needs); team taught by Ms. Codianne and Ms. Joyce.

8. Language therapy activities;

9. Language and psychological consults.

[See also Exh. S-21 and refer to testimony of Ms. Burke.]

In Ms. Codianne's opinion all Jill's special needs, as identified by her testing, are addressed within the proposed program. Moreover, there are additional benefits (inherent in the integrated program) which would enure to her should she attend, including enrichment and social interaction opportunities, modeling, experiential learning, and an appropriate gender mix. Class size per se, she asserted, does not render the program inappropriate and does not present an obstacle to learning, given the highly structured multi-modal nature of the program. Likewise, the presence of two teachers in a classroom is not, as contended by parents' witnesses, inherently distracting.

Ms. Codianne commented upon her spring and fall 1991 observations of the Carroll School program, noting that certain of the classrooms were extremely small, very few visual cues were given, in some classes corrective feedback was not consistently offered, and in other classes, the material was presented haphazardly rather than in an organized and developmental fashion.

5. Gail Burke (hold Masters degree in Reading and Language Arts; certified in English and as a reading consultant) is a team teacher in the integrated language arts class proposed for Jill.

She has reviewed selected records in this matter and attended Jill's fall 1991 Team meeting.

In Ms. Burke's opinion Jill would be very successful in her class, which she described as process-oriented, sequential (eg. each day's lesson builds on the prior), individualized, multi-modal and highly structured, in keeping with Dr. Kemper's recommendations (infra). She went on to indicate that a focus board is utilized as are videotapes, overheads, etc. Instruction takes place on a whole group basis, each lesson has a focus area, and models of expected work are furnished the students. "Guided practice" is often done within the context of small groups. During the "application phase," students work on the designated product, and time extensions are available as needed. Self-editing as well as peer editing are incorporated into the program.

In this witness' opinion the 27 student class size would not be an impediment to effective programming for Jill, as the size factor is mitigated by the presence of additional staffing.⁴

When questioned as to where Jill would fall within her class population vis a vis skill levels, this witness responded that she would be in the lower end of the class.

6. Mary Joyce (holds Masters degree and certification in reading and language arts) is the teacher of the integrated reading class proposed for Jill. She has reviewed selected records in this matter and participated in Jill's fall TEAM. Ms. Joyce testified that the emphasis in her class is on teaching students to derive meaning from what they read, and toward this end the "SQ3R" method is utilized. She went on to say that reading units are coordinated with curriculum in content classes, hence there is carryover in terms of vocabulary, etc. The focus of each unit is clearly delineated and each student has a daily log. Students further participate in cooperative learning groups. Her program generally is success oriented.

Ms. Joyce expressed the view that the enrichment benefits available to Jill through interaction with other students in the integrated setting are very important. She thus disagreed with Dr. Kemper's recommendation that Jill should be placed in small classes with similarly disabled students.

7. Antoinette Jurado-Hilton (licensed, certified speech/language pathologist, HPS; holds masters degree in speech pathology as well as a Certificate of Clinical Competence) tested Jill in April 1991 (Exh. S-4, S-23), and observed her at the

⁴Ms. Burke testified that at times an aide is present in her room.

Carroll School in May and November, 1991.

Ms. Jurado-Hilton's evaluation found Jill to process auditory information slowly (a difficulty which in testimony she characterized as moderate), evidence adequate written language skills, receptive language skills in the average to low average range, and adequate oral expressive language skills (i.e. within the low average range). The report further found that Jill would be able to function adequately in a "classroom" which, via testimony, this witness clarified to mean integrated classroom setting.

Jill achieved the following test scores pursuant to Ms. Jurado-Hilton's evaluation:

(note: chronological age - 12 yrs, 3 mos.; note also that all tests were untimed.)

PPVT - (knowledge of individual words)
 Percentile rank 55
 Age equivalent 12.7

CELF - Mean =10 Standard Deviation =3

	<u>Standard Score</u>
Oral directions	7
Word classes	9
Semantic relationships	7
Formulated sentences	8
Recalling sentences	6
Sentence assembly	7

Receptive language score - 85 (mean =100 standard deviation=15)

Expressive language score - 80 (as corrected via testimony)

Total language score - 81

TOWL (Mean =10 standard deviation =3)

Thematic maturity - 14
 Word usage - 11
 Handwriting - 11

In testimony Ms. Jurado-Hilton endorsed the proposed integrated program,⁵ incorporating a speech/language

⁵ She attested to familiarity with this program through observations.

component⁶, as the best setting for Jill. She explained that Jill would there be exposed to the positive language models of non-handicapped peers, thus enhancing development of pragmatic language, socialization and communication skills. She therefore disagreed with Dr. Kemper's recommendation for Jill's placement in small specialized classes. Furthermore, the integrated program would furnish Jill a structured, focused, multi-sensory classroom in which language is elicited from students.

Ms. Jurado-Hilton went into great detail in critiquing Dr. Kemper's reporting of test scores achieved by Jill pursuant to his evaluation (infra), particularly with regard to his use of descriptors characterizing certain scores as "below" or "low" average. She argued that since many of these scores fall within the standard deviation, they in fact should be characterized as average.⁷ Ms. Jurado-Hilton thus challenged Dr. Kemper's conclusions as to the severity of Jill's needs, since, as per her review, Jill scored below average on only 5 of the 28 subtests.

Based upon her May and November 1991 Carroll School observations Ms. Jurado-Hilton offered the following opinion of the Carroll Program. Most of the teaching was auditorily presented (vs. multi-modally), the physical space was very confining and distracting, some teachers spoke very quickly, not allowing the students enough time to process/express ideas, lessons were not all presented sequentially, and work appeared to involve more book work than hands-on activities.

8. Barbara Sugrue (certified school psychologist, HPS; M.Ed; CAES school psychology) evaluated Jill in April 1991 (Exh. S-3), observed the proposed integrated program in November 1991, the Carroll School in May and November 1991, has reviewed Jill's records and attended her May and November TEAMS.

Ms. Sugrue found Jill to be a student whose cognitive functioning falls within the lower limits of the average range (VIQ-92, PIQ-92, FSIQ-91). She emerged as a gentle girl with no primary psychological problems. She was persistent, evidenced a high tolerance for frustration, and was able to self-monitor, self-correct and maintain excellent attention, focus and energy. Difficulties were noted in organization of complex material,

⁶ ie.- consultation by specialist to teachers to apprise them of Jill's needs for modifications, etc. as well as therapy (emphasizing vocabulary, expressive language)

⁷It should here be noted that the Towl II manual, Exh. P-23, indicates that a score of 7 would in fact (as indicated by Dr. Kemper), be characterized as "below" average. I further note Ms. Jurado-Hilton's similar use, (on the IEP), of the descriptor "low average" in referring to one of Jill's CELF subtest scores.

auditory sequencing, short term auditory memory for non-meaningful information, visual memory, and visual-spatial integration without a model. Her slow rate of processing and retrieving information was well-documented. Limited social maturity and a concrete, somewhat limited understanding of social situations, was further noted. Silent reading comprehension was notable for inefficiency and inconsistency.

Ms. Sugrue's recommendations for Jill included the use of compensatory and memory strategies, allowance of additional time to process and complete tasks, provision of models in acquisition of new skills and more exposure to social situations with opportunities to practice social skills.

In this witness' opinion Jill has demonstrated internalization of good learning strategies as well as a good social foundation. She is ready to move on and it would be a disservice to keep her in a restrictive setting. She went on to state that Jill would be very appropriately placed within Holliston's integrated program, which program, she asserted, combining a good balance of academic support and opportunities for social growth, is the least restrictive placement which would assure Jill's maximum feasible educational development. It would, she testified, offer her organization across disciplines and opportunities for social interaction, particularly with female peers. Moreover, the program embodies most of the educational recommendations contained in Dr. White's report, infra. Large class size, in Ms. Sugrue's view, is not a critical factor for Jill given that she is not distractible, and that students are often divided up into smaller groups.

Ms. Sugrue cited many areas of disagreement with the report authored by Elizabeth Mack, infra, indicating generally that the report is confusing, misleading, contains inconsistencies, conclusions without foundation, over-use of psychological jargon (eg. Jill is indeed persistent but not "perserverative"), and reveals over-testing. Moreover the descriptors used present Jill as a very disabled girl, which is misleading, as is the reported psychological profile (eg. vulnerability to depression, emotional fragility).

With regard to Dr. Kemper's report, Ms. Sugrue cited some inconsistencies and commented that many of his recommendations are not in fact implemented in the Carroll program. Dr. White's report was characterized as general and in some instances speculative and inconsistent (with regard eg., to reporting of Carroll School information).

Based upon her observations of the Carroll School Ms. Sugrue reported that the quarters were cramped and crowded, that math presentations were unclear, and that and the tests given the students had a confusing visual format. Social studies class was

presented strictly verbally (without visuals), and the language class was not presented in a clear, organized manner (in fact, the teacher reinforced incorrect responses).

9. Roberta Edson (Special Education Chairperson, HPS, M.Ed. Special Education) has reviewed Jill's records, participated in her May and November 1991 TEAMS and drafted the proposed IEP (based on input from the TEAM). Ms. Edson further accompanied Ms. Mack (for most of the day) during her October 1991 visit to the integrated program and in addition, accompanied parents for one period of their observation.

Ms. Edson testified regarding the transition component of the proposed IEP, indicating that it would entail careful schedule planning, counsellor input, and assistance, as needed, through the learning clinic. She added that while in her view the 502.4 prototype substantially separate language based classroom is not the program of choice for Jill, it is available to her as a back up, if needed, during the transition period.

With regard to the proposed mainstream math class Ms. Edson testified that it is a basic level course, smaller in size than the average mainstream class, and is staffed by a teacher and an aide.

10. Marie Riley, Principal, Flagg Adams Middle School in Holliston, attended Jill's May and November 1991 TEAMS and would serve as liaison to parents during Jill's transition process. She testified that the transition period is an important one, hence a buddy would be assigned to Jill, teachers would be prepared and adjustments would be made to meet her needs and insure her comfort.

11. Robert Kemper (Masters degree in speech/language; CCC; Ph.D. in developmental psycholinguistics; licensed speech/language pathologist; see resume Exh. P-22) conducted a psycholinguistic evaluation of Jill in October 1991. (Exh. P-2) His findings may be summarized as follows. Jill's overall response rate was extremely slow. Weaknesses were noted in her (a) word retrieval; (b) ability to use/apply vocabulary; (c) processing of information (she experienced a great deal of difficulty with inferencing skills, non-literal questions, processing information containing ambiguity, all of which would affect reading comprehension and ability to follow a lecture format); (d) oral and written narrative ability. Single word receptive vocabulary, spelling, word recognition (de-coding, oral reading) and mechanical aspects of written language expression emerged as strengths. (Note, eg. that on the Slosson, a test of single word oral reading, Jill achieved a grade equivalent of 7.6.) Overall, Jill presented with a severe language learning disability adversely affecting her oral and written language.

When questioned as to his use of the term "severe" language/learning disability, Dr. Kemper responded that it was based in part on his qualitative clinical judgment, the implications of her areas of disability (particularly word-retrieval problems), the CELF testing administered by Ms. Mack and his own testing, given the number of below average scores she achieved.⁸

Based upon his evaluation, Dr. Kemper recommended that Jill be placed in a language based program, in which language is integrated into, and serves as the basis for, instruction in all academic subjects; where classes are small (no larger than 8 students), homogeneous, and instructed by teachers with expertise in learning disabilities (with consultation by a speech pathologist). He explained that small class size is necessary in order to allow for the teacher to interact individually with each student. Homogeneity is important in that students are all working on the same skills at the same time, and can thus act as a support group for each other. Homogeneity further enables the teacher to teach to one range. (See Exh. P-2 for further specific recommendations vis a vis characteristics of an appropriate language based program, and for specific test scores achieved by Jill.)

Dr. Kemper observed selected classes at Holliston's Middle School in December 1991. He described the integrated language skills class as entailing some teacher interaction with students, but in large part a lecture format. (The additional teacher within the class did not speak but rather presented visuals.) Class size was noted to be very large and the level of language used by the teacher to be complex. In Dr. Kemper's view this class would be inappropriate for Jill given the large size and the fact that the vocabulary and language used would be beyond her processing capabilities. Integrated language arts class was characterized as a modified lecture format, with teachers circulating to help students, when asked, with written work.

Dr. Kemper concluded that the Holliston program would not best maximize Jill's educational potential, owing to large heterogeneous classes, lack of individualized instruction and complexity of language used. His observation of the substantially separate classroom led him to conclude it was also not appropriate for Jill, as it was geared to a level below her's.

Dr. Kemper reported that during his December 1991 observation of Jill at the Carroll School the teachers use of language was very much in keeping with the processing levels of

⁸He explained that even though some scores may be just below average (vs. far below) the fact that there are so many subtests which are below average is important in the conclusion of severity.

students, and that staff clarified, repeated, gave feedback and conducted frequent processing checks. He concluded that the Carroll Program could best maximize Jill's educational development.

12. Eliose White (Ed.D.; licensed psychologist; holds certification in moderate special needs) performed a neuropsychological evaluation of Jill in November and December 1991, pursuant to parental request (Exh. P-24). She also reviewed numerous records in order to gather background information. Dr. White found Jill to be a student who experiences significant language and organizational difficulties and who is very slow to process, structure and integrate verbal and non-verbal information. (For example, although her performance on the Gray Oral Reading Test - Diagnostic was in the average range, Jill required about 3 times as long to complete the test as most children.) Jill performed at grade level on tasks of decoding (although decoding was quite slow), however application of analytic language skills were still not automatic and was exceptionally slow.

Dr. White testified that Jill's extreme slowness is a symptom of a serious underlying pathology rather than simply a compensatory strategy or style. Her significant problems with organization and complex problem solving affect and exacerbate her already existing language difficulty, which results in difficulties with processing language in both classroom and social situations. Jill thus does not learn well by just listening, and therefore must be actively involved in the learning process.

Dr. White indicated that Jill's educational program should thus include the following components: (a) small classes to allow for continual interaction/dialogue between student and teacher, in order to insure close monitoring, review and reinforcement of procedures; [Dr. White asserted that small vs. large class size is a key factor for Jill, as such variable changes the learning environment and hence the context in which a given program is administered. In light of her language difficulties (and some degree of distractability) she would have difficulty sustaining attention in a large classroom setting.]; (b) systematic and consistent emphasis across disciplines on procedures to be utilized to handle tasks; (c) systematic emphasis across disciplines on language, ie.-an intensive language based approach to teaching, with all students working on the same thing at the same time. Teachers must provide advanced organizers, new concepts should be introduced via concrete demonstrations, work should be broken into small units, questions should be phrased clearly and concisely. Use of the Project Read program was further recommended. Dr. White went on to say that Jill has not yet automatized many language based tasks, and will require considerably more remediation to do so.

13. Elizabeth Mack (licensed psychologist, M.Ed.;;) first evaluated Jill in January 1985, and has conducted numerous evaluations since that time⁹ (see Exhs. P-13, P-14, P-15, P-16, eg.), the most recent of which was performed in September 1991. (Exh. S-8). She has furthermore reviewed Jill's records, observed her in the classroom setting, observed the proposed Holliston program (S-11) and participated in the fall 1991 reconvening of Jill's TEAM.

Ms. Mack's fall 1991 evaluation found Jill to be a student with good intelligence and motivation, who presents with significant language/learning disabilities which have a strongly organic quality. Noted were difficulties in areas including memory, visual and auditory sequencing, factual and word retrieval, expressive and receptive language, acoustic memory, dealing with what is not inherently structured, organized and definite, and utilizing the structure of language to organize and process material. Concreteness and distractability were also noted. Ms. Mack found that it takes Jill considerable extra time to process language and express ideas, and that she expends immense effort to produce a quality work product. Noted also was her vulnerability and fragile self-esteem, all of which are reflective of her disabilities and previously experienced humiliating social experiences. Strengths were found to lie in her excellent underlying skills and techniques of reading (which she applies conscientiously), her strong knowledge of spelling rules, excellent handwriting, strong calculation ability, good sense of pride in her work and her diligence.

In terms of Jill's progress, Ms. Mack noted emerging skills in many language areas, and emergence of memory strategies which however are not yet automatized nor readily generalized. Substantial educational gains as well as gains in social understanding and self-esteem were further noted.

Ms. Mack recommended Jill's continued placement in the educational environment of the Carroll School, indicating that interruption at this point of the highly successful educational process would be contraindicated academically and psychologically. The following reasons were advanced in support of this proposition: (a) Jill's emerging strategies and skills need to be further developed, integrated and automatized so that she can generalize them; (b) it is important to continue the structured, phonetically based Orton-Gillingham approach which has enabled Jill to develop skills in reading mechanics, etc.; (c) she still requires a small, comfortable setting in which she is not afraid to participate, is safe from peer ridicule and where there is a great deal of student/teacher interaction; (d) material must be broken down, reinforced and presented slowly and

⁹eleven in total

at her level; (e) language must be taught as part of the content curriculum; (f) the environment should be structured, predictable and non-distracting.

Based upon her fall and winter 1991 observations of Jill at the Carroll School, this witness concluded that such program represents the setting in which Jill's educational potential can be maximized. Cited were small class size, a great deal of student/teacher interaction, the fact that all students were working on the same material at the same time, that information was presented slowly and deliberately and that Jill appeared extremely comfortable.

In commenting upon her October 1991 observation of Holliston's proposed program Ms. Mack generally noted that the large class size would be unworkable for Jill, would create confusion and anxiety for her, and would make her reluctant to participate. Ms. Mack further cited the fast pace and large amount of language/material presented as problematic, in addition to the distracting nature of the environment and the insufficient amount of interaction between students and teacher.

This witness further critiqued aspects of Holliston's testing, and the conclusions drawn therefrom, as inaccurate and inconsistent.

14. Mrs. P., Jill's mother, testified regarding Jill's educational history (see Educational History, supra), well as her view of Jill's progress, status and educational needs.

Mrs. P. indicated that Jill is currently happy about her school situation (which in the past was not always the case), more self-confident, and more able to take challenges and work independently. Nevertheless, Mrs. P. indicated Jill still requires a lot of time to complete tasks. Improving peer relationships were also noted.

This witness testified that at the Carroll School material is presented multi-modally, students are given work sheets at their desks, and there is constant interaction between students and teacher. She contrasted this with Holliston's integrated program, which she observed in December 1991 and described as consisting of large classes, some of which are noisy, limited student teacher interaction and fast paced verbalizations. Mrs. P. therefore expressed serious concerns with the appropriateness of this program for her daughter. She likewise did not feel the substantially separate program would be appropriate for Jill, given the very tedious nature of the work presented.

15. Mr. P., Jill's father, presented testimony regarding Jill's educational history, indicating that when Jill left Learning Prep she was a sad, troubled child, shunned by her peers. She was

weak academically, didn't like school and lacked confidence. Since at Carroll she has come to understand her disabilities and is starting to develop a more positive attitude, starting to take some challenges and beginning to develop organizational skills and compensatory strategies. Nevertheless, she is still slow and tedious at doing her work and experiences difficulty making transitions.

Based on his December 1991 observation of Holliston's proposed program Mr. P. echoed the concerns and observations of other parent witnesses, including that of large class size, disruptive nature of some of the classes, use of lecture format, and lack of reference sheets for students' use at their desks. Again, this was contrasted with his Carroll School observation which evidenced students participating in reading, using hand-outs, etc.

Mr. P. acknowledged that Jill has made progress at Carroll, but argued that she is not yet ready to be removed from that small class, language based environment.

16. Deborah Awerman (766 Coordinator, Carroll School; certified in moderate special needs) testified regarding the Carroll School program. (See also Brochure, Exh. P-4 and curriculum description, Exh. P-20.) Ms. Awerman has observed Jill's classes and spoken to her teachers.

According to this witness Jill is currently in the Upper Division at Carroll, which program consists of 58 students. Her schedule entails 2 periods of language class¹⁰ daily, as well as daily math, social studies and science¹¹ and structured study hall. In addition she participates in the Bounders Program (a non-academic course which builds self-confidence), as well as art and physical education. (See Exhs. P-10, P-21.) The Orton-Gillingham method is the underlying approach used for teaching the reading and spelling components at the Carroll Program, and most teachers have been trained in this technique. (See P-25 for information regarding staff credentials.) Classes are small (6-8 students), homogeneous (See Exh. P-29), language based (i.e. language is the focus across disciplines) and utilize a multi-sensory approach. Given the small class size, close monitoring takes place to insure that students understand material presented. Moreover, material is broken down into manageable steps.

¹⁰Note that Jill's language teacher holds a Masters degree in reading and is credentialed in special needs via "grandfathering".

¹¹Jill's science teacher has completed course work for Special education certification but has not yet received same.

In terms of Jill's progress, Ms. Awerman testified that when Jill came to the program she was shy, passive, and did not participate. Today, test scores show academic progress, she is more open and more participatory (although socially she still stays on the sidelines), and more confident in language and math. She still has difficulty in Science and Social Studies however where the context is more abstract and demands that one make inferences. (See Exhs. P-5, P-6, P-17, P-18, S-12, S-25, progress reports.) Jill has learned compensatory strategies and applies them on isolated bases, however she still needs to learn to generalize them. She is further at a critical stage now, where she is beginning to use reading and writing to learn (as opposed to learning to read and write). Ms. Awerman thus expressed concern over moving Jill at this time to a program with large classes, as she still requires small classes where active participation can be insured, in order that she not get lost. Further concerns entailed removing her from a structured, step by step, language based program in which she has flourished.

FINDINGS AND CONCLUSIONS

Jill P. is a student with a disability, falling within the purview of 20 USC s.1401 et. seq., and M.G.L. ch. 71B. As such, she is entitled to a free, appropriate, public education and an IEP which assures her maximum feasible educational development in the least restrictive environment consistent with that goal. Neither her status or entitlement is here in dispute. There is furthermore general consensus between parent and school experts alike as to Jill's educational profile. The record reveals a polite, motivated, persistent student of average cognitive ability, who presents with language/learning disabilities and whose performance is characterized by an extremely slow pace. The controversy in the instant matter centers on placement. Holliston contends that Jill has progressed to a point where she can best be educated within the context of the integrated program available at the Holliston Middle School. The system further contends that maintaining Jill in the more restrictive private school setting would in fact be a disservice at this point in time, particularly with regard to social development and enrichment opportunities. Parents assert that while Jill has clearly made significant progress during her tenure at Carroll, her gains have not yet been consolidated, nor have her compensatory strategies been sufficiently automatized. She hence requires additional time within the small, intensive, language based environment in order to receive requisite remediation. Moreover, in light of her well documented needs and unique learning style she is simply not at a point where she could profit educationally from a large classroom situation in which verbal information is presented at a rapid pace. Rather, her needs dictate placement in a small class setting which allows for constant student/teacher interaction, frequent student participation, close monitoring, and presentations tailored to

her ability and pace.

It is my determination based upon a preponderance of the evidence presented that Holliston's proffered IEP, calling for Jill's placement in the Middle School integrated program, would not confer upon this student maximum feasible educational benefit at this point in her academic career. I make the attendant finding that the program available to her at the Carroll School comports with recommendations of credible experts as to an appropriate educational regime and thus, while more restrictive than the HPS proposal, is, on balance, the program which must be endorsed in keeping with statutory and decisional mandates. My reasoning and analysis of the evidence follows.

When the record is carefully reviewed with regard to Jill's unique needs and learning style, certain key features emerge throughout as clear, well-documented and unrebutted. These include Jill's extremely slow rate of task performance,¹² her on-going difficulty processing information which is abstract, requires inference, or is otherwise ambiguous, and her memory, word retrieval and organizational difficulties. (See e.g., Exhs. S-2, S-3, P-2, P-3, P-24, P-8, S-13.) And, while these significant difficulties may not equally affect every discrete area assessed through standardized testing, they do in fact have a broad, far reaching, impact on many critical areas of educational and social functioning. Jill's ability to follow the flow of a classroom lecture, to process and extract important content from orally presented material, to understand directions, to respond to work demands in a timely manner, and to understand the subtleties of adolescent social interactions would all be significantly compromised by her disabilities. (Dr. White, eg.) Educators and evaluators have thus uniformly recommended that Jill be placed in a structured classroom situation which incorporates a language based, multi-modal format, where student-teacher interaction is insured, student participation is frequent, work is presented at Jill's pace and level, and close monitoring is available to insure that she is understanding the material presented. (Refer e.g., to Exh. S-1, testimony Dr. White.) As experts do not disagree with regard to the nature of the required programmatic components, the question becomes whether such educational format can be effectively and maximally implemented within the context of the program proposed by Holliston. Logic and the record before me dictate a negative answer to this question.

In assessing Holliston's plan, there are, certainly, individual components which do emerge as well suited to Jill's

¹²By way of illustration, according to Dr. White Jill required approximately three times as long as most children to complete the GORT.

needs. The daily academic support class (entailing a maximum of 12 students, staffed by a specialist and an aide, and focusing on remediation, reinforcement, organizational and study skill techniques) emerges as one such component. Language therapy, language and psychological consults, and the inclusion of a transition program are further examples of necessary interventions. Likewise, provision of daily courses in language skills, language arts, and reading evidence an understanding and acknowledgement of Jill's needs in these areas. However, pursuant to Holliston's proposed plan, Jill would spend the majority of her day within large classrooms of 24-27 students, some of whom have special needs and others of whom do not. Admittedly these classes are staffed by both regular and special education teachers¹³, are structured, sequential, coordinated, and implement many of the teaching methodologies and strategies recommended for Jill by parents' experts. However, I am persuaded by credible experts that neither the presence of an additional staff person, nor the structure and strategies utilized can neutralize those factors inherent to a large heterogeneous class situation which render it inappropriate for Jill this year. Dr. White, who presents with impressive credentials in the field of neuropsychology, and who conducted an extensive evaluation of Jill was of the opinion that this student requires an intensive, language based approach to teaching within the setting of small classes, in order to allow for continual student teacher interaction, close monitoring, review, reinforcement, and the additional remediation necessary to enable her to automatize language based tasks. She testified that full and effective implementation of her recommendations for Jill would be compromised within the context of large heterogeneous classrooms, as contemplated by Holliston, given that such setting per se changes the context of service delivery and manner in which the program is administered. Moreover, in this witness' opinion, in light of Jill's language difficulties (as well as the presence in her profile of some degree of distractability) she would experience difficulty sustaining attention in a large classroom.

Dr. Kemper, who is also well credentialed in his field and who performed a thorough assessment of Jill's needs in the language domain likewise asserted her need for small, homogeneous, language based classes which allow teachers the opportunity to interact individually with students and where students can serve as support and reinforcers for each other. Having observed portions of Holliston's integrated program in operation, with the staffing, structure, modifications, and

¹³the former whose primary responsibility is curriculum, and the latter whose primary responsibility is modification, adaptation and input vis a vis special education strategies, interventions, etc.

specialized teaching strategies¹⁴ in place, Dr. Kemper nevertheless concluded that such program would not maximize Jill's educational potential at this point in time. Cited as reasons for his opinion were large class size, lack of individual instruction and the fact that the language used by the teacher was beyond Jill's processing capabilities.

Elizabeth Mack, who has evaluated this student over the course of many years, echoed the opinions of Drs. White and Kemper with regard to the inappropriateness of the environment of the integrated program for Jill. And, Deborah Awerman, presumably reflecting the opinions of Carroll School service providers who have worked with Jill on a day to day basis for a protracted period of time, supported the view that it would not now be beneficial to remove her from the small, homogeneous language based classes which have proven so successful. Jill's on-going need to learn to generalize those compensatory strategies (which she now applies on more isolated bases) was offered as one major reason for this viewpoint.

The contrary opinions offered by Holliston's admittedly well-credentialed, experienced and dedicated witnesses were simply outweighed by the persuasive above-discussed evidence on point.¹⁵

Attention will next focus on the responsiveness of the Carroll School program to Jill's needs. Such program offers the intensive, multi-modal, language based format consistently recommended for her, within the context of small (no greater than 8), homogeneous classes. Such an environment allows for close monitoring, student teacher interaction, student participation and individual attention. Of further persuasive value on the question of the appropriateness of the Carroll program is Jill's history of performance therein. Parent and school witnesses alike agree that this program has proven highly successful for Jill, as evidenced by her academic and social progress since entering. (Refer e.g. to testimony of Ms. Awerman, Ms. Sugrue, Mr. P., Ms. Mack, acknowledging increased independence, self-esteem, development of compensatory strategies and mechanical

¹⁴as described Holliston witnesses

¹⁵It should be noted that in formulating their opinions and recommendations, Holliston staff did not have the benefit of experience working with Jill in an educational setting, given her long history of out of district placements.

It might further be noted at this point that questions of credibility were raised in relation to certain Holliston witnesses, regarding (a) the unexplained omission of Jill's two lowest sub-test scores on an evaluation report; and (b) information offered with regard to descriptors to be used in reporting test scores.

reading and spelling skills.) Hence, despite concerns raised by Holliston's witnesses I am persuaded that the benefits Jill would derive from completing this year at Carroll outweigh, on balance, any negatives attendant to participation in the more restrictive educational setting.

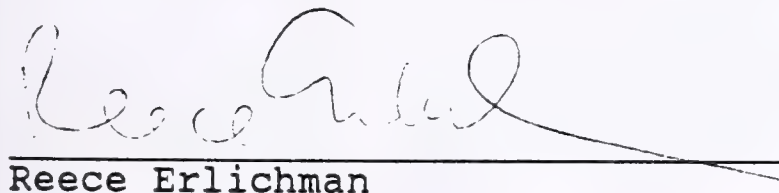
In conclusion, Holliston's proposal to return Jill to the public school setting in order to spend one year in the middle school integrated program cannot be upheld as the educational plan which will maximize this student's educational development this year. Certainly, Jill has come a long way academically and socially during her tenure at Carroll, such that she is approaching readiness for a less restrictive setting and all the benefits inherent thereto. I am persuaded by the record that she requires completion of this year at the Carroll program, where she has been so successful, in order to solidify and consolidate her gains and automatize application of compensatory strategies, so that she will soon be able to generalize them for use in a less restrictive environment. I am further convinced that despite its many attributes, the large heterogeneous class model of the integrated program, when carefully considered against the context of Jill's unique and significant needs, is not the model of choice for this student for this year. Coupled with these factors is the question of the educational efficacy of transitioning a student who has spent virtually her entire academic career outside the public school setting, into a program for less than one academic year, only to then require yet another transition to the high school the following year.

My finding herein should in no way be construed as an indictment of the public school's integrated program. To the contrary, the program should be applauded as well-conceived and forward thinking. Based on the record before me, however, it is simply not the program which will serve to maximize Jill's educational development this academic year.

ORDER

HPS shall bear responsibility for Jill's placement at the Carroll School for the 1991-92 academic year.

By the Hearing Officer



Reece Erlichman

Dated: April 29, 1992

SEP 23 1992

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: JODY C.
MIGUEL C.
LEAN C.

BSEA # 92-1178
BSEA # 92-1177
BSEA # 92-0415

ORDER

It appears that, once again, there has been a failure of communication in this matter. At our last meeting in June, 1992, we agreed to reserve pre-hearing and hearing dates for these appeals in September, 1992. My recollection is that dates were to be used in the event the June agreement between the parties was not being implemented at the start of the school year. In that event, a pre-hearing conference set for September 10, 1992, would serve to clarify the remaining issues and set out the hearing procedures and parameters. Repeated phone calls to ascertain the status of these appeals at the beginning of September yielded no new information. September 10th came and went without any indication from the parents that further assistance from the Bureau was necessary. I was therefore surprised to receive a phone message the afternoon of September 21st that the parent wanted to proceed with a hearing on September 23rd. There has been no written communication with this hearing officer on this matter since June. There has been no indication that the parties' June agreement is not being implemented. I received no exhibits or subpoena requests from either party five days before the date reserved for the hearing as required. Given the undisputed fact that the children and the programs at issue here have undergone extensive evaluation over the past three months, it was my judgment that the hearing could not fairly proceed without information developed between May and September, 1992. To have done so would have been a waste of the scarce time and financial resources of all concerned without any discernable benefit to the children.

This appeal is complex, unique, and highly emotionally charged. To avoid further opportunities for misunderstanding which may prevent constructive interaction among the interested parties, I believe it is necessary to set out the pre-hearing procedures which will apply to this case. Though these procedures are atypically formal, it is to be hoped that counsel will find them useful.

1. Within five days of the date of this letter each counsel shall submit a list of ten days in October and early November on

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which he and all of his potential witnesses are available for the hearing. The Hearing Officer will select five hearing dates. Two days of the hearing will take place in Pittsfield for the convenience of the witnesses from that area. The remaining two or three days of the hearing will take place in Springfield or Worcester depending on the availability of space. Counsel shall schedule their witnesses accordingly. Any conflicts will be resolved by the Hearing Officer.

2. Ten business days prior to the first scheduled hearing date counsel shall submit a pre-hearing memorandum to the Hearing Officer. The memorandum shall: identify each issue on which the party seeks a finding; a summary of the evidence including oral testimony, the party intends to rely upon for each issue; a proposed finding; and the remedy requested as a result of that finding, if any. The parties are reminded that the remedial powers of this Hearing Officer are primarily prospective in nature and are limited to those areas directly bearing on the educational program of the student.

3. All documents to be introduced at the hearing, and a list of actual witnesses to be called at the hearing, noting the duration of expected testimony, shall be exchanged between the parties and submitted to the Hearing Officer no later than ten business days prior to the first scheduled day of hearing. Except upon a strong showing of surprise, no additional documents or witnesses will be permitted at the hearing. It is expected that most pertinent information will appear in document or affidavit form. Witnesses will appear and testify for clarification and cross-examination.

4. All subpoena requests shall be submitted to the Hearing Officer no later than ten business days prior to the scheduled first day of hearing. Each request shall clearly state the day on which each witness is expected to appear. Subpoena for more than one day will not be issued.

5. Objections to any proffered document, witness, or issue covered in the pre-hearing memorandum, shall be made in writing to the Hearing Officer and served on the other party no later than five business days prior to the scheduled first day of hearing.

6. Rulings on the objection, arguments, or on any other pre-hearing matters, including Motions in Limine, will be made on the record between 9:00 and 10:00 a.m. the first day of hearing. Opening arguments, if desired by the parties, may be submitted in writing at that time. The hearing will begin promptly at 10:00 a.m.



7. Any reasonable suggestions about methods to streamline and clarify the hearing procedures applicable to this appeal will be considered by the Hearing Officer. Suggestions shall be submitted in writing with a copy to opposing counsel. The Hearing Officer retains, however, the power to conduct the hearing in a manner designed to create the least disruption for the students, the school, and the potential witnesses.

Should you have any questions or concerns about this pre-hearing order, please feel free to submit them in writing along with the proposed dates of hearing.

By the Hearing Officer,

Lindsay Byrne
Lindsay Byrne (KRA)

Date: Sept. 23, 1992

5/4/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Nicole H.

BSEA #92-0742

DECISION

This decision is rendered pursuant to Massachusetts General Laws, Chapter 71B, 30A, 20 U.S.C. 1400 et seq., and to the regulations promulgated pursuant to such statutes.

A hearing on the above-named matter was held at the Pittsfield City Hall on March 4 and 13, 1992.

Persons present for all or part of the hearing were:

Mrs. H.	Parent of Nicole H., Student
Phyllis Smith	Advocate, United Cerebral Palsey
Howard Eberwein	Special Education Director, Pittsfield Public Schools
Kathleen Alexander	City Solicitor, Pittsfield Public Schools
Valerie Wrba	Special Education teacher, Pittsfield Public Schools
Lynn Bunce	Paraprofessional, Pittsfield Public Schools
Marcia Muir	Paraprofessional, Pittsfield Public Schools
Edward DiNicola	Assistant Superintendent, Pittsfield Public Schools
Kathleen Baker	Special Education Unit leader and teacher
Sandra Sherwood	BSEA Hearing Officer

ISSUES

Whether the Pittsfield Public School's (hereafter, Pittsfield) decision to replace Nicole's 1:1 aide with a different aide denied Nicole's right to an education which maximizes her potential for educational development in the least restrictive setting.

PARENTS' POSITION

Nicole has made exceptional progress over the last year and a half during which time Nicole's 1:1 aide was Marcia Muir.

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Switching her aide to Lynn Bunce has denied her the bonding relationship so necessary for her to make educational progress. Furthermore, Nicole is denied an aide who has the necessary ability to accept the directions of her supervising teacher and specialists. Finally, Nicole has not made progress while placed with Lynn Bunce. Marcia Muir should be reinstated as Nicole's aide.

SCHOOL'S POSITION

Pittsfield's IEP, as implemented with the current 1:1 aide, Lynn Bunce, continues to provide Nicole with an educational program which maximizes her educational development in the least restrictive setting. Lynn Bunce has the required experience and training, she is able to bond with Nicole, and she is able to work under the supervision of the head teacher and specialists. Finally, Pittsfield is bound to this switch in paraprofessionals, due to its Agreement with the Paraprofessional Unit of the Federation of Teachers.

STATEMENT OF THE FACTS

1. Nicole is a six year old young girl who is severely developmentally delayed, has cerebral palsy and seizure disorders. Her skills cluster around the twelve month level, although they range in the six - twenty month level. (Parents' Exh. M) Her relative strengths lie in the gross/fine motor and social areas with weaknesses in language and cognition. (School Exh. A)
2. Nicole has attended Pittsfield's special education classes for several years at the Crosby School. This class is taught by Ms. Wrba, a special needs certified teacher, and each student is assigned a paraprofessional who works in a 1:1 setting with that student. There are ten students in this class, all who are severely developmentally delayed. (Testimony of Wrba) Nicole is provided a program addressing cognition, self-care, gross motor and social skills by the teacher and aide; she is further provided services by the occupational therapist, physical therapist, and the speech/language therapist 2 x week each. The aide observes these sessions and helps Nicole carry out the tasks throughout the week. (Parents' Exh. L, testimony of Ms. Wrba)
3. In May, 1991, the Pittsfield Team developed the 1991 - 1992 IEP calling for the continuation of her special education program. Mrs. H. accepted this IEP in June, 1991. (Parents' Exh. L) However, on October, 10, 1991, when it became apparent that Pittsfield was replacing Nicole's paraprofessional (Ms. Muir), with a new paraprofessional, (Ms. Bunce), Mrs. H. rejected the IEP. (Letter attached to IEP, School Exh. A) Mrs. H. asserts that Ms. Bunce is not qualified to work with her

daughter, in part because she is unable to follow the directions of the teacher and specialists, and in part because she has been unable to establish a bond with Nicole. (Testimony of Mrs. H) Although Pittsfield attempted to accede to Mrs. H.'s wishes, it was unable to do so, due to its understanding that the Union Contract required it to lay off Ms. Muir, who was less senior to Ms. Bunce. (Testimony of Mr. DiNicola) Pittsfield asserts that Ms. Bunce is more qualified for the position than is Ms. Muir, that Ms. Bunce is able to follow directions, and that she is able to form a bond with Nicole. (Testimony of Ms. Wrba, Mr. Eberwein)

4. Due to this dispute regarding Nicole's paraprofessional, Mrs. H. kept Nicole at home for a lengthy period of time this school year. As of the close of the record (mid February), Nicole is attending the program, and Ms. Bunce is Nicole's paraprofessional. The parties dispute Nicole's current performance; Mrs. H. asserts that Nicole continues to be very unhappy with Ms. Bunce; Pittsfield asserts that the bonding is in progress, and although she had a difficult time transitioning to a new aide, she is currently happy for many days at a time. (Testimony of Mrs. H., Ms. Wrba)

FINDINGS AND CONCLUSIONS

I. I find that Pittsfield's 1991 - 1992 IEP for Nicole H. can be implemented with the newly assigned paraprofessional, Ms. Bunce, such that Nicole is provided an education which maximizes her educational development in the least restrictive setting, as follows:

1. There is substantial agreement as to Nicole's educational needs, her strengths and weaknesses, and her skill levels.¹ Specifically, the parties agree that the appropriate setting for teaching Nicole is one where Nicole has a 1:1 paraprofessional who carries out the educational tasks under the supervision of the teacher and the specialists. In such a setting, it is important that Nicole bond with the paraprofessional, and that the paraprofessional be effective in carrying out the directions

¹Such finding is based on the evidence available at the time of the hearing; Pittsfield recognizes the need to conduct the three year evaluation of Nicole and stipulated that it was scheduling such. It is clear from the record that evaluations are needed to address several issues: a) the appropriate carryover of skills into the home, b) appropriate speech/language goals and objectives in the areas of signing, communication board, pictures, c) division of responsibilities between the teacher and paraprofessional, d) appropriate behavior modification system with specific rewards, and e) the amount and type of training of the paraprofessional

of the supervising teacher and specialists. (Testimony of Ms. Wrba, Mrs. H) Both agree that Nicole's strengths lie in the gross motor and social skills area. The parties evidenced little dispute regarding Nicole's skill levels except in the speech/language area; whereas Pittsfield assesses Nicole's skills to be very limited in her expressive language, Mrs. H. asserts that Nicole can express and understand many more words. It should be noted that the speech/language evaluation to be provided by Pittsfield should address this dispute, however, a resolution of the skill level has no bearing on the issue at hand, ie, the appropriateness of the current paraprofessional. The parties also disputed Nicole's current level of comfort with Ms. Bunce. (Testimony of Ms. Wrba, Mrs. H.)

2. Ms. Bunce is able to work under the supervision of the teacher and experts, an ability which both parties recognize is necessary for Nicole. Ms. Wrba, the staff person working most directly with Ms. Bunce, stated unequivocally that she was able to work under her supervision. She further stated that, where her requests were not carried out, it was due to confusions and that when the situations were clarified, Ms. Bunce acted appropriately. Given this statement, her testimony must be given more weight than the testimony provided by Mrs. H. who, although having observed the class, is not there on a regular basis to assess this, but is rather in a position only to raise her concern. Indeed, her concern must be addressed carefully, for Mrs. H. is clearly a dedicated parent who has her child's best interest at heart. After a careful review of the testimony from Mrs. H., Ms. Wrba and Ms. Bunce, I am persuaded that Ms. Bunce is indeed able to take direction from the teacher and specialists. This is not to say that a further look at whether sufficient supervision and coordination between the specialists and the paraprofessional is being provided. However, the evidence supports the position that Ms. Bunce is indeed able to work under the supervision of the teacher and the specialists.

3. Lynn Bunce has evidenced her ability to bond with Nicole. Although both parties recognize the importance of the paraprofessional's bonding with Nicole, no evidence was provided as to how to determine whether a person is capable of providing this. The evidence is persuasive, however, that the bonding is in fact occurring between Ms. Bunce and Nicole. That is, whereas Nicole was initially not happy with Ms. Bunce, after working with her, she is having many more happy days in school. This was confirmed by Ms. Wrba. Although Mrs. H. disagrees that Nicole is happier, her evidence of Nicole's behavior at home was insufficient to rebut the evidence of several staff who stated that Nicole is increasingly happier. (Testimony of Ms. Wrba) Further, the staff stated that Nicole is increasingly turning towards Ms. Bunce when she enters the room, evidence her growing attachment to her. (Testimony of Ms. Wrba) Finally, Mrs. H.'s evidence must be weighed against the fact that Nicole's previous

bonding process took many months before she developed the strong attachment to Ms. Muir. (Testimony of Ms. Muir, Mrs. H., Ms. Wrba) Thus, the bonding process with Ms. Bunce appears to be on course. It should be noted that, given the lengthy period required for Nicole to bond with her paraprofessional, frequent turnover of staff could be problematic in terms of maximizing her educational potential. In this case, however, such does not appear to be at issue, for Nicole had been with Ms. Muir for at least a year and a half. Thus, a change at this time is not unreasonable.

4. Lynn Bunce's lack of experience working with children with disabilities like Nicole's does not, at this time, interfere with Nicole's obtaining an education which maximizes her educational potential. Such finding is based solely on the evidence provided by Ms. Wrba who stated unequivocally that Ms. Bunce's lack of experience was offset by her providing more supervision, and that Nicole was thereby not affected. She elaborated by saying that she as well as the specialists provided Ms. Bunce with on the job training. Her opinion must be given great weight, for first, she is the only person with expertise who testified in regards to the qualifications required to work with Nicole. Secondly, she is the person who can see on a day to day basis whether Nicole's program is working. I note that this finding is based on the evidence provided by the parties. (Testimony of Ms. Wrba) However, it must be noted that the record reflects a lack of an up to date indepth evaluation of Nicole's educational needs. Thus, after the evaluations are obtained, Pittsfield will need to reassess whether there are any additional requirements of the paraprofessional. The requirements may remain the same, or a restructuring of the program may be warranted, either through the necessity for a more experienced and trained aide, more on the job training, or more direct teaching by the teacher, or closer supervision. But these are merely possible options to be considered by the evaluators and the TEAM. Currently, the evidence supports the finding that Lynn Bunce is able to provide for Nicole's educational needs such that her potential for educational development is maximized in the least restrictive setting. I further note that this finding is made after weighing the fact that the IEP calls for a trained paraprofessional. The IEP is vague, however, as to the meaning of "trained", and is therefore given little weight in resolving this issue.

5. The parties' assertion is unpersuasive that Pittsfield is bound by the Union Contract to employ a paraprofessional who may be inappropriate for Nicole. Although Ms. Bunce is found to be appropriate for Nicole, if she were not, the Union Contract does not bind Pittsfield to place her in the position of paraprofessional for Nicole. That is, the Contract repeatedly states that seniority is the governing criteria where the applicant is qualified for a particular position. It states:

In the event of cutback in programs, paraprofessionals shall be terminated on the basis of seniority; the employees with the least seniority being the first to be laid off, providing that the individuals involved are qualified to fill existing position and such procedure is not contrary to the best interests of the system. (Parent Exh. A, Article VII, F1)

Thus, for instance, if it were determined that Nicole required a paraprofessional who knew how to sign, or had experience with children functioning at the 1 - 2 year level, for instance, then Pittsfield's contract would not require the use of a paraprofessional who had no signing abilities or no experience working with such children. Such person would not be qualified.

ORDER

Pittsfield shall continue to implement the 502.4 prototype IEP with the current paraprofessional, Ms. Bunce. Pittsfield shall conduct its three year CORE evaluation in accordance with the Chapter 766 regulations, with specific attention to the necessary responsibilities of the paraprofessional, training requirements, and level of supervision required.

By the Hearing Officer



Sandra Sherwood

Dated: May 4, 1992

5/29/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

RE: Robert P. v. Ashfield-Plainfield

BSEA #92-0766

DECISION

This decision is written pursuant to 20 USC 1401 et seq., 29 USC 794, M.G.L. chs. 30A, 71B, and the Regulations promulgated thereunder.

A hearing in the above-noted matter was convened on December 11, 1991 in Shelburne Falls, MA and thereafter on January 15, 1992 (in Worcester), February 3, 1992 (in Northampton) and February 28, 1992 (in Worcester).¹

The following persons were in attendance for all or part of the proceedings:

Linda P.	Parent
John Drake	Attorney for Parent
Sally Carver	Family Relative
Richard McInerney	Administrator of Special Education, Mohawk Trail Regional School District
Peter Smith	Attorney, Ashfield-Plainfield
Alyson Patch	Classroom Teacher, Sanderson Academy
Martha Conant	Reading Teacher, Sanderson Academy
Marie Hodgkins	Special Education Teacher, Sanderson Academy
Sam Louisigran	Friend of Parent
Judith Souweine	Psychologist, Children's Clinic
David Drake	White Oak School
Jerry Hopkins	Family Relative
Margaret Suby	Evaluator, Weaver Clinic
Robert Weaver	Evaluator, Weaver Clinic
Reece Erlichman	Hearing Officer

ISSUES PRESENTED

Does the 502.1 prototype IEP proposed for Robert by Ashfield-Plainfield (Exh. S-W, P-5) serve to assure his maximum feasible educational development in the least restrictive environment consistent with that goal?

¹ By agreement of the parties the record remained open for submission of closing argument, to be dated no later than March 30, 1992.

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If it does not, does the 502.5 prototype program available to him at the White Oak School meet said standard?

Is parent entitled to retroactive reimbursement of tuition and transportation costs incurred as a result of Robert's placement at the White Oak School during academic 1991-92?

Is Ashfield-Plainfield responsible for costs of the independent evaluation performed by the Weaver Clinic in 1991?

PRELIMINARY STATEMENT

Robert P., is an almost 13 year old student with an identical twin brother. He has been described by evaluators as an extremely learning disabled, hardworking child of average to above-average cognitive ability, who presents with a severe, specific dyslexia and associated attention deficit disorder. Significant grade levels deficits in academic skills secondary to such learning disability are well documented. (Refer to Exh. S-2, S-7, S-14, P-3, P-4 e.g.)

Robert's educational history may be summarized as follows. (See e.g. Exhs. P-31, S-2; refer to testimony Mr. McInerny.) After attending two years of the Head Start program Robert entered kindergarten at the Sanderson Academy, a public elementary school. He repeated first grade, and daily resource room assistance was commenced during this year. (See Exh. S-3, 502.2 prototype IEP, covering, the period 1/87-1/88 and calling for one hour daily of language arts services within the resource room, on individual and small group bases.) An amendment to this IEP was thereafter drafted, covering the period 9/2/87-1/88 and calling for provision of small group remedial reading services (using an Orton-Gillingham or similar program) daily for 30 minutes. Resource room services (in spelling and writing) were reduced to 30 minutes daily (Exh. S-4). Pursuant to a review held in February 1988, another amendment was drafted, this of the 502.2 prototype, covering the period 3/88-3/89 (representing portions of grades 2 and 3) and calling for 55 minutes per day of services within the resource room (on small group and individual bases) addressing spelling and writing, as well as 1/2 hour daily of reading services (Exh. S-5). Subsequent to an independent evaluation performed by Dr. Souweine in July 1988 (*infra*), a 502.3 prototype IEP was proposed (covering the period 10/88-3/89), calling for 45 minutes daily of resource room math, 45 minutes daily of resource room services addressing reading, spelling, penmanship, writing and auditory discrimination, and weekly in-school counselling. Modifications within science and social studies classes, as well as other accommodations were called for, as was the use of the Stevenson Language Approach (Exh. S-8). Pursuant to a January 1989 review, a 502.3 prototype amendment was drafted, covering the period 2/89-2/90 and providing for a total of 2 1/4 hours daily of resource room

assistance and reducing counselling to monthly sessions. (See Exh. P-9, S-9.) A diagnostic plan was proffered and accepted for grade 5 (9/90-11/90, see Exh. S-16, S-17) pursuant to which Robby was placed in regular fifth grade classes, curriculum modifications were implemented (Exh. S-18) and small group reading (Orton-Gillingham methodology), language arts and organizational/study skills services were furnished daily. Furthermore, the educational team was to meet every two weeks during the course of the diagnostic plan to review progress and status. (See, e.g. Exhs. S-19, S-20, S-21.) In November 1990 an IEP of the 502.1 prototype was proffered covering the period 11/26/90-11/26/91 and calling for weekly monitoring of Robby's progress within the context of a mainstream setting, reading instruction from a reading specialist (delivered within the classroom), modifications to the regular education curriculum, as well as after school and summer components (Exh. P-13, S-23). Parent later rejected this plan in part, owing to a lack of specificity, but accepted provision of services contained therein (Exh. P-15, S-A). In January 1991 this 502.1 prototype IEP was re-drafted, continuing the programmatic elements of the November proposal, incorporating the specific curriculum modifications, and making provision for special transportation for the after-school program. (Exh. S-27, S-28). During the summer of 1991 Robby received home tutorial services (Exh. P-7, S-C).

Via letter of September 27, 1991 Mrs. P. rejected all previous IEPs for her son (Exh. S-M), and on October 4, 1991 requested a BSEA hearing (Exh. S-O).

The IEP under review in the instant case is of the 502.1 prototype and covers Robert's grade 6 year (11/8/91-11/8/92). Said program generally involves a continuation of the 1990-91 integrated model, and more specifically entails the following elements:

- (a) participation in 6th grade classes with curriculum modification;
- (b) weekly monitoring of progress;
- (c) monthly speech/language consult;
- (d) daily 1:1 work with reading specialist on structured learning strategies (within the classroom, while other students are also working on these skills);
- (e) daily Language Arts - regular sixth grade class, 14-15 students; part of period co-taught by reading teacher; when students break up into groups, reading teacher would work 1:1 with Robert² for approximately one hour (using Orton-Gillingham and eclectic techniques);
- (f) Math-regular sixth grade class, approximately 16 students; tutor (aide) would work individually with Robert within the classroom;

² in grade 5 she worked 1:2, with Robert and his twin brother

(g) Social Studies/Science - regular sixth grade classes, approximately 16 students;

(h) daily 1/2 hour structured study, with reading specialist within classroom (computer, study skills, etc.). (Note that an extended day component was proposed by the TEAM but rejected by parent.)

[See Exh. S-W and refer to testimony Mr. McInerny.]

In the fall of 1991 parent removed Robert from the public school. (See Exhs. P-18, P-19, P-21; S-L; S-MC). On November 18, 1991 she placed him at the White Oak School, a 502.5 prototype placement, where he remains to date. (See Exh. P-23.)

STATEMENT OF THE EVIDENCE

1. In January 1987 (during the year Robby repeated first grade) he underwent psychometric testing at the Massachusetts General Hospital Learning Disabilities Unit. Academic testing revealed him to then be performing at a beginning first grade level on the WRAT-R reading and spelling tests, a K.9 grade equivalent on the Standard Early School Achievement test in word reading, letters, and sounds, and a 1.7 grade equivalent in math. The examiner found him to be a boy of above average intellectual function with well developed language functions. Significant deficits were noted in organization and sequencing, central auditory processing and motor integration tasks, which cumulatively have a devastating impact on the acquisition of reading skills. Substantially separate classes for reading, spelling and language arts were recommended, as was integration among the three curricula, and use of a multi-sensory reading program (e.g., Stevenson or Orton-Gillingham). (See Exh. S-2.)

2. Marie Hodgkins (holds certification in special education) provided resource room services to Robert from his (repeat) grade 1 year through grade 4. She was further his TEAM chairperson for 1990-91, met with service providers weekly during that year, and further performed assessments in March 1990 and February 1991, results of which may be summarized as follows:

(a) March, 1990 testing - (See Exh. S-10; note actual grade 4.7, age 10-10.)

Houghton Mifflin Pupil Placement Test

Word recognition -1B g.e.

Oral and silent reading -independent level-pre-primer
instructional level - beginning second g.e.
potential listening comprehension-4th g.e.

WRAT-R

Reading - 1E
Spelling - 1E
Arithmetic - 2E
Keymath - 3-9 g.e.

The examiner noted slow steady progress and recommended continuation in the resource room for language arts and math, as well as support for mainstream content courses.

(b) February 1991 testing. (Exh. S-D)

GORT-R Read stories 1-5; high comprehension scores on stories 1-4, on story 5, 19 deviations from print with poor comprehension.

Houghton Mifflin Pupil Placement Reading Test - scored at a grade 2 instructional level, oral reading was fluent and comprehension was strong.

WRAT-R - Reading (decoding) g.e. 1E
Spelling g.e. 2B

Ms. Hodgkins concluded that Robby continued to show slow steady growth, comparing his inability to read the pre-primer GORT paragraph in 5/88 with his current test results revealing him to be at a solid grade 2 reading level. (See Exh. S-D.)

In her testimony Ms. Hodgkin's indicated that at the end of grade 4 the decision was made to alter Robert's program (from the 502.3 prototype model to the 502.1 prototype mainstream model) for a variety of reasons. Firstly, various reading/spelling programs had been utilized with him (e.g., she had employed Stevenson) and staff was questioning whether additional progress could be effectuated with a different approach. Moreover it was felt that provision of special services within the classroom might mitigate the isolating nature of the resource room. Finally, there was concern that Robert was beginning to "shut down" and think of himself as a non-learner because of the isolation of the resource room setting, and it was felt that increased mainstreaming would mitigate this.

3. In February and March, 1991, Robby underwent a speech and language evaluation, performed by Ms. Blatt, certified speech/language pathologist. The examiner found receptive and expressive language to be at age appropriate level, with mild difficulty noted, eg. in assembling and combining sentences. Monthly consultation between classroom teacher, reading specialist and speech pathologist was recommended. (Exh. S-30)

4. Alyson Patch (M.Ed; regular education teacher, Sanderson Academy) was Robert's fifth grade mainstream teacher in a

classroom of 16 heterogeneous students. She furthermore participated in monthly meetings to review Robert's status and progress.

Ms. Patch described Robert's program as entailing language arts within the mainstream, during a portion of which the reading specialist would come into the room and work with Robert (and his brother). Math was likewise delivered within the mainstream setting and a special education aide assisted both boys (in the classroom) during this period. Robert further participated in mainstream social studies and science, which courses this witness indicated involved a great deal of hands-on activities and group cooperation. He further participated in learning strategies, likewise in the mainstream, and during this time the reading teacher again joined the classroom to assist Robert and his brother on organizational matters and other areas in which they needed extra help.

Ms. Patch explained that written materials were furnished her containing information regarding curricula modifications, and recommended teaching techniques/strategies for use with Robert (including but not limited to reduced/modified assignments; allowing someone to read test questions to him, write answers down for him; use of cassettes; oral presentations to accompany written instructions). The use of a computer for writing assignments was further recommended although it did not work out as planned.

Ms. Patch characterized grade 5 it as a very successful year for Robert. She testified that he showed good growth in math generally, working successfully in a 5th grade level math text. In reading he chose fifth grade level books for independent reading, seemed interested and more independent. As the year went on he even chose to read aloud at times and his reading, while not fluent, was certainly comprehensible. Overall, in this witness' opinion, Robert's reading deficit did not impede, to any real degree, his ability to learn, given the adaptations, modifications and special assistance implemented. Attentional issues were furthermore not problematic.

Ms. Patch highlighted Robert's development of self-confidence during this year, explaining that he was happy, felt himself to be a part of the fifth grade class, enjoyed good relationships with staff and peers, was confident, and was not emotionally at risk. In her opinion, placing him in the regular classroom was the best thing that could have been done for him.

Ms. Patch further testified that the sixth grade plan to separate the twins (for homeroom and special instruction) was done in part to allow for individualized (1:1) reading

assistance, and in part for Ricky's³ sake, so he would not continue to compare himself to Robert. (See also 1990-91 classroom assessment, Exh. S-F, and grade 5 report card, Exh. P-25, revealing final grades of A in Reading and Language; A- in Science, and Social Studies; B in Math, and excellent effort vis a vis social attitudes; see also Exh. P-32.)

5. Martha Conant (certified reading specialist) worked with Robert on reading skills in grade 2, and was the specialist who assisted him daily (within Ms. Patch's classroom) during grade 5. Her services consisted of the following elements. During language arts period, students were typically divided into small work groups, and Robert and his brother were not in the same group. She would thus go into the mainstream room and circulate between the groups⁴, assisting the boys by writing down brainstorming ideas, helping them with spelling, editing or reinforcing what the teacher was presenting. This service was furnished daily for 25 minutes. During reading period she would likewise go into the mainstream classroom and, in a separate area, work with Robert (and his brother) for 45 minutes daily utilizing the Orton-Gillingham system and remedial readers (Open Highways). At times spelling and cursive writing were also addressed. She further worked with the boys during learning strategies' period, during which time pre-teaching, etc. was furnished. Ms. Conant testified that Robert was always ready to work, adding however that sometimes the interaction between the boys did serve as a distraction.

In assessing Robert's progress this witness indicated that at the beginning of the year he was reading at a low first grade level, however by year's end, he had achieved a very early grade 3 level. She explained that his comprehension was very good (at least grade level) because, while he might not be able to read every word, he made very good use of context clues. Spelling was further noted to have improved as the year went on, as Robert was able to self correct. Gains were generally noted in all areas in which she worked with him. She further testified that Robert was accepted by his peers and was very much a part of the regular 5th grade class. (See also Exh. S-P.)

Pursuant to the plan proposed for 1991-92 (grade 6) reading services would be increased from 45 minutes to 1 hour daily and would be delivered on a 1:1 (vs. 1:2) basis, hence separating Robert and his brother. The curriculum would include continuation of the Orton-Gillingham approach for reading,

³ Robert's twin brother

⁴ She indicated that while she worked with either Robert or Richard for 90% of the period, she did circulate to other groups at times so as not to stigmatize the boys.

spelling work, Open Hi-Ways, and other high interest, low vocabulary reading.

6. Judith Souweine (Ed.D; licensed psychologist, certified in special education, school psychology) was secured by parent as an independent evaluator in 1988. She assessed Robert in July of that year, and again in 1990 (See Exhs. S-7, S-14, P-31). For academic 1990-91 she was hired by the school system as a program consultant/monitor for Robby's program, pursuant to which she reviewed curriculum modifications, attended frequent (at least monthly) meetings (see Exhs. P-7, P-8, P-10, P-11, P-12; S-29, S-26, S-31, S-C), and observed Robby frequently in class.

Pursuant to her July 1988 evaluation Dr. Souweine found Robert to be an extremely learning disabled child with attentional deficits, evidencing some decrease in intellectual functioning as compared with 1986 WISC-R scores. Deficits were noted in memory, phonetic analysis, planning, organization and visual-motor areas. Test scores included:

WRAT - reading - 1B	GORT-R unable to read first
Spelling - mid. gr. 1	paragraph
Arithmetic - End gr. 2	
(Note: actual grade - end 2)	

At that time Dr. Souweine indicated that while Robert was a good candidate for an out-of district placement, no such day placement existed in the area. She therefore recommended that his entire language arts program be furnished in the resource room, that the Stevenson approach be utilized, that intensive tutorial services be provided and that accommodations be made in mainstream classes.

Pursuant to Dr. Souweine's May 1990 evaluation she reviewed recent testing performed by school personnel as well as conducting considerable testing on her own. In comparing her 1988 WRAT administration to Ms. Hodgkins' March 1990 administration it was noted that in a two year period Robert's reading score went from a beginning to an end first grade level, and spelling from a mid to end first grade level, with no change evidenced in arithmetic. On his current GORT-R performance Robby was able to read the first two paragraphs, however quickly, inaccurately and not fluently. His passage score was at less than the first percentile for his age, with comprehension at the first percentile. On the Kaufman Assessment Battery he achieved:

Arithmetic - 4.7 ge
Reading/decoding - 1.6 ge
Reading/understanding - 1.6 ge

His writing skills were generally assessed at a first grade level, based on a writing sample furnished.

At this time Dr. Souweine found Robby to be a severely dyslexic youngster who despite concerted efforts by special and regular education staff (including modifications in regular education programming) had made only limited progress over several years, evidencing a widening gap between his achievement and that of his age mates. A comprehensive, out of district placement for dyslexic students was recommended to enable him to acquire reading and writing skills. (Exh. S-14)

In testimony Dr. Souweine stated that since no approved, appropriate 502.5 placements were available within reasonable commuting distance at the time of her 1990 assessment, (and given that parent did not favor a residential placement), a new plan was developed by the LEA, incorporating a mainstream based model (as it was felt the isolation of the resource room was not beneficial), and including tutorial and support.

In assessing the program furnished Robert during 1990-91 Dr. Souweine testified that service providers were very competent, excellent coordination existed among them, and classroom materials as well as specialized materials were generally appropriate. Robert was an active participant in the regular fifth grade program, and appeared confident, calm, mature, and well motivated within that setting. He evidenced more independence as a learner and was beginning to read stories on his own. He was able, with support, to work within the regular classroom texts. Moreover, he was socially well accepted, popular and comfortable, hence it was clear that social benefits had enured to him as a result of his mainstream placement (vs. the "pull-out" model). In general, it was her opinion that the combination of mainstreaming and intensive support had a positive effect on Robert's significant disabilities.

In assessing the plan proposed for Robby for 1991-92 this witness indicated that said plan, generally representing a continuation of the 1990-91 model, is viable. She explained that Robby is comfortable in the mainstream setting, willing without embarrassment or avoidance to do lower level work within the classroom, and has not evidenced feelings of frustration or low self-esteem. This, when considered in light of the benefits inherent to a mainstream setting (typical peers; more normalized environment; good models; achieving successes in a grade level situation; social opportunities) renders such an integrated model workable for him. She further endorsed the decision to separate Robby from his brother and provide him individual services through Ms. Conant. She did recommend that some additional 1:1 services be furnished after school, owing to his grade level deficits and the more demanding assignments of 6th grade. She further recommended additional access to a computer. (See also Exh. S-Q.)

Dr. Souweine was asked to comment upon the evaluations performed at the Weaver Clinic. (See Exhs. P-3, P-4, discussed infra.) She indicated that the disparity between Robert's classroom functioning and test scores there achieved may be attributable to the hiatus from participation in a school program and/or the fact that he was test weary. Moreover, while acknowledging that his single word decoding skills are very low, Dr. Souweine explained that ability to read single words, as measured by the WRAT, is not a critical indication of ability. Rather, it is a student's ability to read connected words within a text. And, in this area, Robby demonstrated the ability to read 6 passages on the GORT (vs. her administration wherein he only read 2), and demonstrated the ability to utilize his good vocabulary, listening skills, intellectual capacity and inferential skills in order to comprehend reading material despite poor decoding. She testified that many of the Weaver recommendations are incorporated within the public school program (both 1990-91, 91-92) and expressed disagreement with the recommendation that Robby requires placement in a full time language based program with similarly disabled peers.

Dr. Souweine, who expressed familiarity with the White Oak School through observation, indicated that it does represent the type of program which she recommended for Robby in 1990, embodying a good program plan, good schedule and appropriate materials. However, she expressed concerns with the atypical environment (it is located in an industrial park), the fairly inexperienced staff, the large age span of the population, the small number of girls and the lack of support services (i.e. consultants). When questioned as to whether, in her view, the White Oak program or the public school plan would greater enhance Robby's rate of progress she responded that they have many similar components, each would have some advantages and some trade-offs, and hence it would be difficult to speculate as to which program would prove more productive for him.

7. Richard McInerny (certified Administrator of Special Education; Moderate Special Needs) is the Director of Special Education for Mohawk Trail and its affiliated districts. He testified regarding the programmatic and procedural history of this matter and further presented detailed information as to the components of the proffered plan for 1991-92 (see Preliminary Statement, supra). Mr. McInerny indicated that in addition to the terms of the plan as written, an after school program was orally offered to parent at the TEAM meeting but summarily rejected. Such after school program (which he noted would still be available to Robert) would consist at a minimum of an hour per week of enrichment, computer time and/or individual tutorial. He further stressed that a great deal of flexibility exists within the proposed program vis a vis additional tutorial time, etc.

In commenting upon the results and recommendations of the Weaver Clinic testing, Mr. McInerny testified that all recommendations (with the exception of out-of-district placement⁵) could and would be accomplished within the public school. He explained that the lower test scores achieved by Robby at Weaver (compared with Ms. Hodgkins' testing) may be attributable to test fatigue, unfamiliar setting, and the fact that he had been out of school for a period of time. He furthermore explained that many of the tests given measure a student's ability to read words in isolation, out of context, etc. as opposed to a student's ability to read for meaning within a classroom situation, augmented by auditory and visual input.

Mr. McInerny expressed familiarity with the White Oak School, having visited it in the fall of 1991, and noted concerns with staff expertise, wide age range of students and travel time involved.

8. David Drake (Headmaster, White Oak School; does not hold teaching certification; former teacher, Landmark School, see Resume, Exh. P-28) testified regarding White Oak, which 502.5 prototype program in Springfield, MA opened in the fall of 1990. He further provided information regarding Robby's performance and status at the program.

Mr. Drake described Robby as a cooperative, energetic, participatory, well-behaved student, who is well liked at school. Academically he shows difficulty with syllabification, certain short vowels, substitution of words and skipping lines. (He assessed his decoding ability at the second grade level.) His comprehension is good when material is read to him, however when he reads to himself his comprehension is more commensurate with his reading ability. His spelling skills are at a very low level, he does not know upper case cursive letters and is weak in his lower case cursive. Math was described as a relative strength for this student.

In describing White Oak this witness testified that the school consists of 34 students (30 males, 4 females) ranging in age from 9-19⁶, and is housed within a modern building in an office park. Classes run from 8:30-3:30, are ungraded and, students are grouped by skill level and age. With the exception of gym, class size does not exceed 8 in number. All courses are

⁵ While private placement options had been pursued in 1990 as per Dr. Souweine's then recommendation for same, no appropriate placements then existed within reasonable geographic proximity, thus the integrated program was developed for him.

⁶ Note there is one nine year old and one nineteen year old in attendance. The average student age is approximately 13.

language based, and content is used as the medium for the development of language and organizational skills. Robby's daily schedule was described as entailing the following:⁷ Math - (teacher certified in Moderate Special Needs); Language Arts - oriented to written expression skills; (teacher holds Masters degree in special education; certified in special education in NYS; awaiting reciprocity); Science - (teacher certified in regular education, currently in special education masters program); Oral Expression - (teacher certified in Moderate Special Needs); Social Studies - (teacher certified in regular education; enrolled in special education masters program); Tutorial - utilizes a linguistic - phonetic approach toward the remediation of decoding deficits; addresses organizational skills as well; utilizes Let's Read Series.

(Note: same teacher as Social Studies); Art/P.E. (alternating). Robby furthermore has access, on an as needed basis, to the computer.

In this witness' opinion the program offered Robby at White Oak is responsive to the recommendations of the Weaver Clinic evaluators. (See also White Oak brochure, Exh. P-27.)

9. Margaret Suby, M.Ed. (reading therapist, M.G.H.; holds language certification from M.G.H.; member, Orton dyslexia society) evaluated Robert in October 1991 at the Weaver Clinic. She further reviewed his records and his IEP. Her testing yielded following scores:

Woodcock - Word ID - 2.1 g.e.
Word attack - 1.2 g.e.
Letter ID - 2.4 g.e.

GORT-R - Passage score - below gr. 1; comprehension -4.7 g.e. He was able to read the first 6 paragraphs with excellent comprehension (but with support and prompting).

Informal Reading Assessment (Listening Comp.)
Independent level - g.e. 3
Instructional level - g.e. 4

Test of Written Spelling
Predictable words - 3rd percentile
Unpredictable words - 4th percentile

Test of Written Language
Contextual style and syntactic maturity - 9th percentile
Contextual vocabulary - 5th percentile

⁷ Note: Robert is in 3 classes with his brother and no problems have been evidenced to date.

Contextual spelling - 2nd percentile

Key Math - Total score - 5.2 g.e.

Ms. Suby concluded that Robby is a serious, hardworking student whose sight word and decoding skills remain at the grade 1-2 level, whose writing remains largely indecipherable (see sample, Exh. P-3), and who requires practice with basic math operations. Despite the fact that he demonstrates an ability to comprehend given a great deal of support and prompting (which she indicated, bears testimony to his intelligence), he is not reading or writing independently at a literacy level and, literacy is the bottom line for this student.

In order to address his needs and the widening gap between his reading/writing skills and those of his peers, Ms. Suby recommended Robert's placement in a comprehensive, full day language based program, which offers intensive 1:1 tutorial, small classes, classmates who share his disabilities/good intellectual ability, close monitoring, coordination, carryover and reinforcement of material across disciplines and among service providers. Further recommendations included the use of the Orton-Gillingham or Wilson reading systems (for reading/spelling), practice in math computation, etc.

When questioned regarding the appropriateness of the proposed IEP, Ms. Suby testified that she does not feel it meets her recommendations nor that it would foster Robby's optimal progress. Reasons cited were: (a) it is not appropriate for him to be in a classroom with students who are 3-5 years ahead of him in reading/writing skills; (b) sufficient reinforcement of language skills would not occur in mainstream classes - ie. allowing him to participate auditorily in these courses does not address his basic need to learn to read and write; (c) 1:1 tutorial delivered within a classroom setting while a class is going on is not an appropriate model. Ms. Suby added that she feels the public school's reports of Robert's progress are not borne out by his test scores.

This witness indicated that she has visited⁸ the White Oak School and spoken to staff. Based on this she feels such program (encompassing full day language based classes, intensive tutorial) more closely matches her recommendations for Robert.

10. Robby underwent a neuropsychological evaluation (performed by clinical neuropsychologist Dr. Kraidman) at the Weaver Clinic in October, 1991. (See Exh. P-4.) The examiner found Robby's fund of factual information, vocabulary, comprehension of non-verbal social sequences and attentional capacity for different

⁸ but did not observe Robert's program

types of information to be within normal limits. When manipulation of this information was required, however, attentional functioning became considerably less competent. Performance on tasks involving perceptual analyses was variable, in that as the designs became more complex he was disorganized in approach and committed errors of omission, relative size and misplaced details. Difficulties in orientation and rotation of letters were further noted. The examiner concluded that signs associated with moderately severe dyslexia as well as attention deficit disorder were apparent, and recommended intensive assistance to teach organizational strategies as well as specific tutoring throughout the school day, aimed at his dyslexic impairment.

11. Robert Weaver, Director, Weaver Clinic (Ph.D. Clinical Psychology; follow in neuropsychology) has reviewed Ms. Suby's and Dr. Kraidman's reports, has spoken with Dr. Kraidman, met with Robby several times, observed him at White Oak and reviewed selected records, including the proposed IEP.

This witness testified that the recommendations of the Weaver Clinic reports cannot be implemented within the context of a regular classroom. In this regard he raised questions as to both the intensity and duration of the remedial help furnished pursuant to this model as well as the adequacy of support, e.g. resources, reinforcement, etc.

Dr. Weaver went on to state that while there are certainly benefits inherent to mainstreaming (eg - socialization, extracurricular activities, normal peer modelling), there is a question of balancing involved. He pointed out that Robby is acutely aware of the differences between himself and his peers (ie - that he cannot do what others can academically) and is embarrassed by it.⁹ Moreover, the program proposed at Sanderson Academy is itself very isolating (despite that fact that it may technically be the "least restrictive") in that Robby would be the only student in said program.

In Dr. Weaver's opinion, Robby is currently not literate, however he has the potential to become so. Given his severe degree of learning problems he needs intensive, remedial work throughout the day, in an environment (1:1 or small group) which allows for the required degree of intensity. The White Oak School offers individual tutorial as well as small homogeneous classes, and a full day special education program, within a supportive environment. Moreover, Robby has indicated to him that he personally feels he has made academic gains at White Oak,

⁹ Dr. Weaver noted however that Robby's self-esteem issue is limited to the academic arena and does not spill over into the social, or sports domains.

whereas he did not feel he was learning at Sanderson, and feels more competent and confident placed with peers who present with problems similar to his. Thus, as between the Sanderson and White Oak programs Dr. Weaver endorsed the latter as the program in which Robby would derive more remediation and intervention with regard to basic skill development.

Dr. Weaver went on to recommend therapy for Robby, asserting that he is currently at risk emotionally owing to the finality of his twin brother's White Oak placement as opposed to the unsettled issues around his placement.

FINDINGS AND CONCLUSIONS

Robert P. is a student with a disability, falling within the purview of 20 USC 1401 et seq. and M.G.L. ch. 71B. As such he is entitled to a free, appropriate public education and an IEP which assures his maximum feasible educational development in the least restrictive environment consistent with that goal. Neither his status or entitlement is in dispute. There is likewise agreement between the parties as to the nature and extent of his needs. He is uniformly described by evaluators and educators as a student of average to above average cognitive potential, who presents with a significant learning disability (to wit: specific dyslexia) and associated attention deficit disorder. Substantial grade level deficits secondary to this disability are evidenced in numerous academic skill areas, and are well documented throughout the record. The dispute in the instant matter centers on placement. Parent argues that after seven years of programming within the Ashfield-Plainfield system Robert has still not demonstrated effective progress, evidencing yet indecipherable written work and on-going grade level deficits of 3-5 years in critical reading and spelling skills. Given his age, the extent of his disability, and his academic history, the current IEP, representing a continuation of the model implemented last year, is not sufficiently intensive or specialized to address his needs. Rather, he requires placement in a specialized program for learning disabled students, in which he can receive intensive special services throughout the day, within the context of small, homogeneous classes. Ashfield-Plainfield asserts that the integrated model in which Robert participated during grade 5 (to wit: delivery of special services within the regular classroom; participation in mainstream classes with curriculum modification) was successful in addressing his needs, effectuating both academic, social and emotional gains. The 502.1 prototype IEP for 1991-92, representing a continuation of said model with some notable amendments (e.g. - delivery of increased reading services within the classroom on a 1:1 vs. 1:2 basis) should therefore be endorsed as the least restrictive program which will maximize this student's potential.

It is my determination based upon a preponderance of the evidence presented that the plan proposed by Ashfield-Plainfield for Robert, covering the period November 1991-November 1992, would not assure his maximum feasible educational development in the least restrictive environment consistent with that goal. I further find that the program available to him at the White Oak School, while more restrictive, is on balance the program which must be endorsed in keeping with the above-noted standard as it offers the intensive, day long, specialized programming and remediation he requires, and thus comports with recommendations of credible experts in this regard. My rationale follows.

A review of Robert's educational history within the Ashfield-Plainfield system reveals a retention in grade one, followed by many years¹⁰ of learning disability and reading services furnished (to varying levels and degrees) pursuant to the "pull-out" model; that is Robert was removed from his mainstream classes in order to receive discrete services within a resource room setting. We further see attempts by the system at utilizing varying approaches and methodologies within this context in order to best address his severe disabilities in reading and writing. However, never was a truly self-contained, substantially separate 502.4 prototype learning disabilities program implemented for this "extremely learning disabled" student with "severe dyslexia" (Exhs. S-7, S-2), this despite painfully slow (and sometimes non-existent) gains in decoding and written expression skills and a significant and widening gap between actual and grade level performance, under the rubric of the resource room model. (Exh. S-14) The reason for this educational decision was not elicited at hearing. I further note that during this same time period Dr. Souweine twice recommended out-of-district placement for this student¹¹ in the face of school evaluators' reports of slow and steady progress, and on-going recommendations for continued resource room services. (See, e.g., Exh. S-10.) The TEAM's acknowledgement that the resource room model was not working for Robert¹² is ultimately evidenced by the change in approach embodied in the plan authored

¹⁰ grades 1 (repeat) through 4

¹¹ The record reveals that at the times of these recommendations no private day placement was available within reasonable geographical proximity and parent did not want to pursue a residential option. However it does not speak to the question of substantially separate public school programs either within the system or in adjoining systems.

¹² Speculation as to reasons for his lack of progress as offered by Ashfield-Plainfield included the theory that the resource room pull-out model may have been too isolating for him and hence he was beginning to "shut down" to learning.

for his fifth grade year, this calling for delivery of special services within the mainstream and participation in mainstream courses with curriculum modification. (Again, apparently no consideration was given to the fact that Robby may well have needed on-going remedial services of equal or greater intensity to that furnished him in the resource room, but delivered, instead, in a different educational setting, to wit: a self-contained program¹³ in which he would be part of a cohesive group of similarly situated students, receiving specialized intensive services throughout the day.) Attention will next focus on Robert's performance during grade 5, as this is clearly one critical factor in assessing the appropriateness of the 1991-92 IEP, given the similarity of the two plans.¹⁴

Robert's mainstream teacher Ms. Patch, a dedicated and competent professional, testified that grade 5 was a very successful year for Robert in many areas (including development of self-confidence, social relationships and independence, as well as academic growth). In her view his reading deficit did not impede to any real degree, his ability to learn, given the adaptations, modifications and special assistance implemented. Reading specialist Ms. Conant noted gains in all areas in which she worked with Robert, and Dr. Souweine testified that the combination of mainstreaming and intensive support had a positive effect on Robert's significant disabilities as well as his independence as a learner.

I am persuaded by these experts that positive social experiences may well have enured to Robert by virtue of his increased participation in the mainstream, and further that academic enrichment opportunities were enhanced through his presence in mainstream, grade level content courses. Certainly, such benefits cannot and should not be minimized in assessing the relative merits of the program before me. However, Robby's significant deficits in basic skills critical to his very literacy must likewise be afforded careful consideration and in fact deference. And, I am not convinced that such underlying deficits were maximally impacted within this model. Firstly, as per Ms. Suby, recent test scores belie reports of meaningful gains in decoding and written expression. (See, e.g. October 1991 Weaver Clinic testing revealing Robert's sight word and decoding skills to be at the grade 1-2 level, his written language skills to fall within the 2nd to 9th percentiles, and his spelling skills to fall within the 3rd-4th percentiles.) Secondly, while Robert's comprehension ability is clearly far beyond that of his

¹³ within a public school or collaborative setting

¹⁴ That is, both call for participation in mainstream classes with curriculum modifications, as well as receipt of specialized individual assistance within said classes.

decoding and written expression (a tribute to his good intelligence, vocabulary, and the special education services provided him) it should be noted that certain of the tests measuring his comprehension levels entailed prompting/cuing on the part of the examiner (Ms. Suby, e.g.), and thus do not truly reflect his comprehension capacity in a completely independent situation. Likewise, Robert's reported use of grade level texts within a classroom situation, while desirable and admirable, is not a wholly accurate indicator of his independent comprehension ability, given the auditory/visual input, reinforcement, modifications and support there provided.

I am convinced by the record before me that at this point in his academic career Robert must be afforded maximal opportunity for intensive/specialized attention to his underlying deficits, in order that he may function in the future as an independently literate person. The question thus becomes whether such services can be effectuated within the model proposed by Ashfield-Plainfield, and the record leads me to include that it cannot. Consider first that only a small portion of Robert's school day would be devoted to receipt of special services per se. Secondly, such services would be delivered on a 1:1 basis within a large heterogeneous classroom, a classroom in which other students are working on different materials (3-5 years above his level) as he receives tutorial. The efficacy of this model for Robert emerges as questionable on two levels. With regard first to the academic arena I am not convinced that the setting contemplated, with its inherent distractions, represents the optimal learning environment for provision of critical tutorial and remedial services to a student with severe dyslexia and ADD. (Ms. Suby e.g.) And, with regard to the psycho-social arena, the potentially stigmatizing and isolating effect on a thirteen year old of being the sole student to receive special assistance within a mainstream class situation cannot be overlooked (Dr. Weaver).

In conclusion, while Robert clearly derived educational benefits in discrete areas from his fifth grade program, the IEP proposed for grade 6 simply offers too little too late, to a student for whom the bottom line is literacy. Despite enormous effort, commitment and flexibility on the part of Ashfield-Plainfield over the years, Robert's basic skills remain woefully low. Given his good motivation and strong cognitive ability however, there is every reason to believe that once he receives appropriate, intensive, specialized programming for a requisite period of time, he will thereafter be able to move to the less restrictive setting of the public school for the remainder of his academic career.

I turn next to a consideration of the White Oak School. As described by its director, such school offers Robert small group, homogeneous classes which utilize specialized techniques and

methodologies throughout the day, specifically geared to the needs of learning disabled students with at least average cognitive potential. In addition, daily tutorial services are provided. According to Mr. Drake, Robert has adjusted well to the program and, as per Dr. Weaver, perceives that he is learning and progressing there. (He contrasted this with Robert's perception of not learning at Sanderson.) Moreover, Ms. Suby testified that based upon her understanding of the White Oak program it more closely matches her recommendations for Robert than does the Sanderson program (which, in her view, could not fully implement same). And, even Dr. Souweine, (who now advocates for the Sanderson program despite prior recommendations for private placement) when questioned as to whether White Oak or Sanderson would better enhance Robby's rate of skill development candidly testified that she could not answer with certainty as there are pros and cons to both programs.

The general concerns with the White Oak program articulated by Ashfield-Plainfield witnesses are simply not, on balance, persuasive.

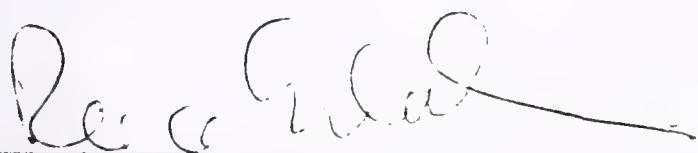
Ashfield-Plainfield shall therefore immediately assume responsibility for Robert's placement at the White Oak School for the duration of academic 1991-92, and shall further reimburse parent for costs incurred as a result of said placement from November 18, 1991 to date. [Amherst-Pelham Regional School Committee v. Department of Education, 381 N.E. 2d 922 (1978); Town of Burlington v. Massachusetts Department of Education, 736 F.2d 773 (1st Cir. 1984)]

I will next address parent's claim with regard to Ashfield-Plainfield's responsibility for costs of the October 1991 independent evaluation performed at the Weaver Clinic. On April 5, 1991, Mrs. P. made written request of Ashfield-Plainfield that a full evaluation be performed. (See Exh. S-A.) Ashfield-Plainfield's response to same, as contained in an April 10, 1991 letter to Mrs. P's then attorney was, "I do not believe it is necessary to subject either child to further intensive evaluation at this time." The letter goes on to state that the TEAM has directed the speech/language therapist as well as the resource room instructor to conduct current assessments. (See Exh. S-A.) On October 11, 1991 Mrs. P. made written request to Ashfield-Plainfield that an independent evaluation, to include neuropsychological and educational evaluations, be performed at the Weaver Clinic. (See Exh. S-S.) This request was denied by Ashfield-Plainfield on the ground that more than 16 months had elapsed since the last evaluation performed by the school, and hence the request was not timely. (See Exhs. P-17, S-T, S-U.) Thereafter, Robert in fact underwent neuropsychological and educational assessments at the Weaver Clinic.

It is my determination that Ashfield-Plainfield is responsible for costs of the independent evaluation secured by Mrs. P. for Robert at the Weaver Clinic, to the extent of and in accordance with rates set¹⁵ for such evaluations, and is hereby ordered to fulfill said financial responsibility forthwith. I am at a loss to understand the school's position in this matter. The parent was first denied her request for a full TEAM evaluation, only to then be denied her request for an independent evaluation on the basis of timeliness, using as a reference point for same the last full evaluation performed by the school. Certainly, Ashfield-Plainfield cannot have it both ways. And, if it were to be contended by Ashfield-Plainfield that the Weaver evaluations were not equivalent to the types of assessments which would have been performed pursuant to a full TEAM evaluation (had such full evaluation been done in accordance with parental request), such argument would likewise be unpersuasive. Certainly, the educational component could not be challenged on these grounds; and, with regard to the neuropsychological component, Ashfield-Plainfield clearly could not demonstrate that all areas of Robert's suspected special needs would have been assessed absent same, particularly in light of the system's reliance on the two previous neuropsychological evaluations (performed by Dr. Souweine) in planning Robert's 1990-91, and 91-92 IEPs.

[See Reg. 328.3.]

By the Hearing Officer



Reece Erlichman

Dated: 5/29/92

¹⁵ To the extent that there is no rate set for either one or both of the evaluations performed, Ashfield-Plainfield shall seek an individual rate for same in accordance with rate setting regulations.

3/18/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: TABITHA B.

BSEA #92-0809

DECISION

This decision is issued pursuant to M.G.L. ch. 71B, 30A, and 15; 20 U.S.C. ss. 1491-1461; 29 U.S.C. s. 794, and the Regulations promulgated under those statutes. A hearing was held on March 4, 1992, at the Administrative Office of the Cambridge Public Schools in Cambridge, MA. Those present for all or part of the proceeding were:

P.C.	Parent
Gary Snyder	Vision Specialist - Cambridge
Susan Evans	Director of Home-based Programs - Cambridge
Linda Cravens	Coordinating Psychologist - Cambridge
Daniel McCarthy	Administrator of Special Education - Cambridge
Karen LaMontagne	Advocate for Parent and Student
Helen Roy	Observer
Lindsay Byrne	Hearing Officer, BSEA

The official record of the hearing consists of documents submitted by the Parent, labelled P-1 through P-26, exhibits offered by the school, marked S-1 through S-6, and approximately five hours of recorded oral testimony and argument. No written closing arguments were received from the parties by the agreed upon date, March 13, 1992. The record closed on that date.

ISSUE

I. Whether the 502.8 IEP developed by Cambridge for the 1991-1992 school year provided for placement in an integrated center-based preschool program, or whether it offered "services only" to the student?

II. Whether the 502.8 IEP developed by Cambridge for the 1991-1992 school year was reasonably calculated to provide the maximum feasible educational benefit to Tabitha in the least restrictive setting?

PARENT'S POSITION

Tabitha requires individually tailored special education services in the context of a regular preschool program. Cambridge developed an IEP calling for Tabitha's placement at the

Cambridge-Ellis School, a private preschool, with supportive services. The parent accepted the IEP, but Cambridge failed to implement it. Cambridge has not complied with the regulations concerning preschool special education services, or provision of services pending resolution of a dispute. Further, Cambridge has failed to deliver an appropriate special education program to Tabitha over the course of the current school year.

SCHOOL'S POSITION

As a matter of policy, Cambridge does not pay private pre-school tuition. It offered Tabitha the special education services of a vision specialist at the preschool and a home-based educator through a 502.8 "services only" IEP for the 1991-1992 school year. This IEP could be implemented in any setting, including a kindergarten for which Tabitha was age appropriate by September, 1991.

SUMMARY OF THE EVIDENCE

1. Tabitha is a five year old (d.o.b. 3/28/87), who is severely, visually impaired, due to congenital glaucoma. She received early intervention services prior to entering the Cambridge Public School system at age 3. (P-1 through 5, P-8) Other than limited visual skills, Tabitha's development is age-appropriate. After a preschool screening, conducted by the Cambridge Public Schools in January, 1990, recommended placement in a regular preschool program, the TEAM contacted a number of local private preschools about their willingness and ability to serve Tabitha. (Cravens, Ms. C.; P-10; P-7) At a TEAM meeting held on April 4, 1990, the TEAM developed an IEP for Tabitha, to run from April through June, 1990, and throughout the 1990-1991 school year. (P-11).

2. The 1990-1991 IEP listed a 502.8 prototype for Tabitha. It listed the school as Cambridge-Ellis, a private preschool. It listed special services to be delivered at home and at Cambridge-Ellis. The duration of the program was to be 3½ hours per day for 180 days. The goals and objectives included classroom goals and objectives. Special transportation was to be provided to and from Cambridge-Ellis. (P-11). The IEP was implemented throughout the 1990-1991 school year. (Ms. C., Snyder) Tabitha received a full scholarship from the Cambridge-Ellis School, so that the issue of public school tuition payments to Cambridge-Ellis did not arise. (Ms. C.)

3. At a meeting held on May 14, 1991, to plan Tabitha's 1991-1992 school program, the TEAM considered the reports of Tabitha's Cambridge-Ellis classroom teacher, Ms. Rosenthal, and the consultant orientation and mobility specialist, Mr. Snyder. No other assessments or progress reports were sought or produced by Cambridge Public Schools. (Cravens, Ms. C., Evans)

Ms. Rosenthal found Tabitha's adaptation and integration

into the Cambridge-Ellis environment to be good. She recommended that Tabitha continue in a small classroom with a low teacher-student ratio and requested more vision, orientation and mobility consultation to the regular program. (P-14, S-4)

Mr. Snyder, the orientation and mobility specialist who worked with Tabitha and with the Cambridge-Ellis staff throughout the 1990-1991 school year, testified that Tabitha made significant gains in her ability to move through and integrate herself into a regular environment during the course of the year. He found Tabitha to benefit enormously from the integration in a regular environment with supportive vision services. He developed individualized vision goals for Tabitha, which were presented at the TEAM meeting, but not included in the 1991-1992 IEP. All of the vision goals were predicated on the assumption that Tabitha would be working primarily with a regular teacher in a regular, preschool environment. (Snyder) In his written report to the Team Mr. Snyder found Tabitha:

to be appropriately placed in her preschool group. The school environment offers many of the necessary experiences for learning in the areas of movement, social interaction, perception and learning of spatial and environmental concepts. She needs on-going opportunities for practice and refinement of her motor and social skills. (P-13, S-6)

There were no other educational recommendations. (Evans) There were no recommendations for a change of placement. There was no discussion of a possible kindergarten program. Cambridge did not request other evaluations. Nor did it offer the parent the opportunity to look at other potential placements. (Cravens) Cambridge-Ellis informed the TEAM that it could not offer Tabitha a scholarship for the 1991-1992 school year. The parent requested that the public school fund Tabitha's tuition. The TEAM chair said she would check on the feasibility of the request and the meeting concluded. (Ms. C.)

4. The 1991-1992 IEP developed as a result of that meeting called for a 502.8 program for Tabitha. (P-15, S-5) It listed Tabitha's school as "Cambridge-Ellis and her grade as "Pre". It recited Tabitha's adjustment to and progress in the Cambridge-Ellis program noting: "Based on this progress, continuation in this placement, with these services is recommended." The student profile portion of the IEP presumes a classroom placement, though the service grid provides only for direct vision and home-based services. The Annual/Daily duration section is not completed, however the IEP notes that Tabitha is to be enrolled in "mainstream" courses with special education support. Special transportation to and from school is provided. All the goals and objectives incorporated into the plan are built upon the routine and environment of regular preschool. The IEP further recommends the assignment of an aide to Tabitha in the classroom. It provides that a behavior consultant will assist the classroom

teacher. Finally it recommends that speech, hearing, language, and low-vision assessments be performed in the fall, 1991. Ms. C. accepted the proposed IEP on June 7, 1991.

5. Shortly before school began Ms. C. called the school to inquire about transportation arrangements for Tabitha. She was told that Cambridge Public Schools would not be providing transportation, or indeed any of the services listed in Tabitha's accepted IEP, as Tabitha could enroll in kindergarten. (Ms. C.) On September 13, 1991, after school began Ms. C. received a letter from Linda Cravens, Coordinating Psychologist for Preschool Programs, stating that the 1991-1992 IEP prepared for Tabitha: "is for a 502.8 (service only) program prototype. Tabitha is age appropriate for kindergarten in Cambridge and so these services could be provided in a kindergarten situation." (P-17) Ms. Cravens testified at the hearing that she had no knowledge of Tabitha's individual educational characteristics and the proposed kindergarten placement was based on Tabitha's attained age in September, 1991. She acknowledged that there were no educational recommendations for a kindergarten placement. Ms. Cravens testified that it was Cambridge Public School policy not to pay for any regular education services for preschool special needs children.

6. Mr. McCarthy, Director of Special Education for Cambridge Public Schools, reiterated the Cambridge policy of refusing to fund private pre-school tuition for preschool special needs children. He acknowledged that kindergartens in Cambridge contain four and five year old students. He stated that Cambridge special needs student under the age of five attends kindergarten with a 502.8 IEP. On the child's fifth birthday the IEP prototype is automatically switched, by computer, from a 502.8 to a 502.1, 2, 3, or 4 indicating a school-age prototype. Mr. McCarthy testified that the prototype change is done solely for fiscal and reporting purposes and does not reflect any substantive change in educational profile or program for the student involved. He stated that the only purpose of the prototype is to report the service level to the state. Mr. McCarthy further stated that it was not necessary for the Team to reconvene when a child transitioned from a preschool program to a kindergarten program. (McCarthy)

7. On September 23, 1991, Ms. C. rejected the 1991-1992 IEP insofar as Cambridge Public Schools asserted that it was a "services only" IEP. Ms. C. accepted the services set out in the IEP and argued that the IEP clearly called for Tabitha's placement by the public school at the Cambridge-Ellis integrated day school. (Ms. C., P-18) The services not in dispute were those of a vision specialist at the Cambridge-Ellis School and a home-based educator. These services began in late September, 1991. (Ms. C., Snyder) The IEP also provides for a classroom aide and a behavior consultant. Neither of these services had been provided up to the time of the hearing in March, 1992. The IEP recommends that speech, hearing, language, and low vision

assessments be performed in the fall, 1991. Thus far no such assessments have been undertaken by the Cambridge Public Schools. (Cravens, McCarthy) The IEP also provides for door-to-door transportation. The transportation issue was the subject of an emergency hearing on November 22, 1991. An order was issued on December 5, 1991, requiring Cambridge Public Schools to comply with the last-agreed upon transportation plan pursuant to the 1990-1991 IEP. (A copy of that order is attached hereto.) Cambridge Public Schools is currently complying with that order. (Ms. C., McCarthy)

FINDINGS AND CONCLUSIONS

There is no dispute that Tabitha is a student with special learning needs as defined by M.G.L. ch. 71B and 20 U.S.C. 1401 et seq, and that, therefore, she is entitled to receive a free, appropriate public education. Here the issue is one of interpretation and intention: Whether the 1991-1992 IEP developed for Tabitha provides for her placement in an integrated preschool with supportive services as the parent contends, or whether Tabitha should receive strictly limited, portable, direct services pursuant to a "services only" IEP as the public school asserts. The parent's interpretation of the 1991-1992 IEP is wholly supported by the evidence and by the applicable law. Furthermore, the parent's position is the only one which is reasonably calculated to provide the maximum feasible benefit to the student in the least restrictive setting. The interpretation of Tabitha's IEP, advanced by the Cambridge Public Schools, and the actions taken by the public school with regard to this student, are legally and educationally insupportable.

First, the only educational assessments presented at the May, 1991, Team meeting held to plan Tabitha's 1991-1992 school year, recommended that she continue her then current placement at the Cambridge-Ellis integrated preschool with support services. Nowhere in the documentary or testimonial evidence at the hearing is there any indication that another program type, model, location, etc., was considered for Tabitha. The Team meeting participants presumed that Tabitha would attend Cambridge-Ellis in the fall. There is no educational justification in the record for any other conclusion.

Second, the IEP developed as a result of that meeting, though it did reflect all of the Team member's input (for example, Mr. Snyder's missing vision goals) clearly contemplated Tabitha's continued attendance at Cambridge-Ellis. (See, paragraph 4.) All the coordinated goals and objectives refer to a preschool curriculum. All references to a particular school are to Cambridge-Ellis by name. (P-15, S-5) The IEP offers a highly coordinated and integrated educational program which appears to meet the recommendation of the Team participants. (Snyder; P-13, S-6; P-14, S-4, Evans). No reasonable person reading the entire 1991-1992 IEP could surmise that this document offered Tabitha only three hours of special educational service a

week. Nowhere on the document itself is there any notation that it was a "services only" IEP, as Ms. Cravens testified. No parent could reasonably be expected to attend a TEAM meeting at which everyone agreed that the student's continued placement in an integrated preschool would be maximally beneficial, then to receive an IEP which lists the preschool by name and discusses the integrated curriculum, and then to conclude that the public school was offering only limited services which could be delivered in any location.^{1/} Such a conclusion would defy logic and Cambridge's argument to that effect strains credulity.

Third, the Cambridge Public Schools' position that the 502.8 IEP it offered to Tabitha could be implemented in a kindergarten classroom is without educational and legal foundation. Putting aside for a moment that fact that there were no educational recommendations for Tabitha's placement in a regular kindergarten program, and the fact that such a substantial change in program focus and locus requires a reconvening of the TEAM, which did not occur, the 502.8 program prototype is designed for children aged three and four, with some five year olds. According to Mr. McCarthy, the public kindergartens accommodate four and five year old children, with some six year olds. This classroom grouping is not contemplated by the early childhood regulations, and a 502.8 program prototype may not properly be used to describe the special education services delivered in such a setting.

Both Ms. Cravens and Mr. McCarthy described the 502.8 prototype as a state funding and reporting device. It may be true that the state uses it as such. Under the regulations to which the parent has access however, the 502.8 prototype describes three different models of service delivery to three and four year old special needs children. None of them is a "services only" model. None of them describes service delivery in a kindergarten.

Cambridge's use of the 502.8 prototype as a fiscal reimbursement mechanism obscures its purpose under the regulations as a description of the relative level of special and regular educational services a student is receiving. Furthermore, the use of a 502.8 prototype in the instance, without the further descriptor of the paragraph (b), did not accurately reflect the TEAM's consensus concerning the appropriate level and location of educational services for Tabitha.

^{1/}I note that, even if I were to find that Cambridge Public Schools clearly and explicitly offered only limited support services to Tabitha, such limited services are not supported by the educational recommendations in the record and therefore, could not, by themselves, be found to constitute an offer of appropriate educational programming for Tabitha.

Fourth, the policy of the Cambridge Public Schools, described by Mr. McCarthy and Ms. Cravens as its blanket refusal to fund tuition to private preschool programs for special needs students, violates the IDEA. Such a policy fails to take into account and to accommodate the individual learning needs of each preschool special needs child, as is required by both state and federal special education law. Furthermore, it contravenes the local educational agency's duty to afford a continuum of publicly funded educational placements to disabled students within its jurisdiction. In this case, the illegal, unwritten policy was cited by both Ms. Cravens and Mr. McCarthy, as Cambridge's justification for refusing to implement an IEP developed by consensus of TEAM members and accepted by the parent. Cambridge's improper reliance on this policy has, throughout the 1991-1992 school year, denied Tabitha access to the free, appropriate public education to which she is entitled, and has caused her parent substantial hardship and expertise. The existence of such a policy is a continuing, and egregious, violation of the procedural and substantive educational rights of disabled children in Cambridge.

Finally, while both Mr. Snyder and Mr. McCarthy testified that they were not entirely satisfied with Tabitha's current educational program at the Cambridge-Ellis pre-school, neither stated that it was inappropriate for Tabitha. Indeed, all the credible evidence supports the conclusion that the Cambridge-Ellis preschool is the least restrictive, educationally-appropriate program available to Tabitha. No evidence of program alternatives was introduced at the hearing. Neither was there any indication by any Team member that other program options were considered or explored. If concerns arise during the course of a school year about the placement's ability to properly implement the IEP goals and objectives, as was Mr. Snyder's contention here, the remedy is to reconvene the Team. That has never been requested by Cambridge in this instance. Instead, Cambridge has used its concerns about the lighting and physical environment at Cambridge-Ellis during the 1991-1992 school year, as additional justification for its non-compliance and non-implementation of the accepted portions of the disputed 1991-1992 IEP. Such actions have only added to the list of Cambridge's procedural improprieties in this matter, and have failed to contribute positively to Tabitha's education. The preponderance of the credible evidence available at the hearing supports a finding that the Cambridge-Ellis preschool is the least restrictive, appropriate educational placement for Tabitha for the 1991-1992 school year.

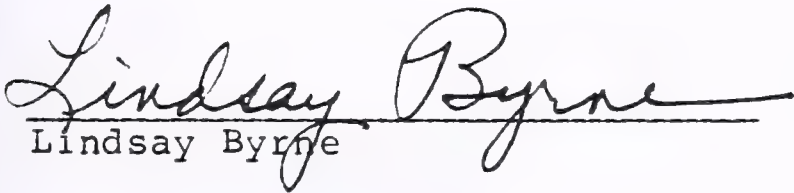
ORDER

Based on the clear preponderance of the evidence at the hearing, I find that the Cambridge Public Schools has failed to deliver an appropriately individualized special educational program for Tabitha during the 1991-1992 school year. Cambridge shall immediately implement the 1991-1992 IEP developed by the

TEAM and accepted by the parent in its correct form as a 502.8(b) placement. Such implementation shall include, but not be limited to:

- a.) Publicly-funded placement at the Cambridge-Ellis preschool program;
- b.) Direct vision-specialist services to Tabitha and consultation to the classroom teacher;
- c.) Home-Education component;
- d.) Transportation to and from school;
- e.) Speech, language, hearing, and low vision evaluations;
- f.) Reconvening the Team to discuss the need for, type, and/or duration of behavior consultant and classroom aide services;
- g.) Reimbursement to parent of all-out-of-pocket expenses incurred as a result of securing appropriate educational services for Tabitha during this school year.

By the Hearing Officer:


Lindsay Byrne

Dated: March 18, 1992

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

3/19/92

IN RE: G.R. v. FRAMINGHAM

BSEA # 92-0841

DECISION

This decision is issued pursuant to M.G.L. c. 15, 30A and 71B, 20 U.S.C. 1401 - 1461, 29 U.S.C. 794 and the regulations promulgated under those statutes. A hearing was held in the above entitled matter on December 17 and 18, 1991, and January 3, 14 and 28, 1992 at the Administrative Offices of the Framingham Public Schools in Framingham, MA. Those present for all or parts of the hearing were:

Marlene R.
Barbara Cutler
Judith A. Breslof
Rhonda Taft-Farrell

Nancy Bradley

Gail Arena
Sheila Ranley

Robert Leonard

Kathleen A. Quill
Joanne DeSiato
Arthur Golden
Philip B. Benjamin

Jane M. Lavoie

Parent
Autism Consultant
TEAM Coordinator, Framingham
Director of Special Education,
Framingham
Speech and Language
Pathologist, Framingham
Aide
Head Teacher, Job Entry
Training Program, Keefe
Vocational Technical High
School
Pupil Personnel Coordinator,
Keefe Vocational Technical
High School
Autism Consultant
Observer
Attorney for Parent
Attorney for Framingham

Hearing Officer, BSEA

44-156

The official record of the hearing consists of documents(1) submitted by the parent marked P-16, P-19, P-31, P-40, P-42, P-43, P-49, P-50, P-54, P-67, P-68, P-70, P-77, P-78, P-79, P-80, P-81, P-82, P-83, P-84, P-85, P-89, P-93, P-99, P-100, P-104, P-105, P-106, P-108, P-110, P-126, P-129, P-130, P-139, P-154, P-158, P-159, P-160, AP-1, AP-52, P-165, P-166, P-167, P-168, P-169, P-170, P-171, P-174, P-175, P-178, P-179, P-180, P-181, P-184, P-193, P-203, P-204, P-219, P-5, P-6, P-8, P-9, P-10, P-32, P-35, P-37, P-39, P-41 (excluding pages 213, 214, 219, 220), P-46, P-53, P-60, P-71, P-75, P-76, P-86, P-90, P-92, P-98, P-103, P-112, P-115 (excluding page 384), P-117, P-118, P-125, P-138, P-147, P-148, P-150, P-157, P-161, P-162, P-163, P-177, AP-86, AP-87, AP-88, P-89, AP-90, P-182 and P-183), P-188, P-202, P-216, P-217, P-218, P-233, P-242, P-243, P-244, P-227, P-232, AP-91, AP-93; documents submitted by the school marked S-1 through S-7, and S-9 through S-14; and approximately 13 hours of recorded oral testimony. Mrs. R. was represented by attorney Arthur Golden and Framingham was represented by attorney Philip Benjamin. Parent chose not to submit a written closing argument. Framingham submitted a written closing argument on February 10, 1991 and the record closed on that date.

ISSUES

1. Is the program prototype 502.4 Individualized Educational Plan (IEP) proposed by Framingham for the 1991-1992 school year reasonably calculated to provide G. R. the maximum feasible educational benefit in the least restrictive setting?

2. If not, is the educational program proposed by Ms. R. the least restrictive, appropriate educational alternative for G. R.?

SCHOOL'S POSITION

The program prototype 502.4 IEP that Framingham has proposed for G. R. for the 1991-1992 school year is reasonably calculated to provide him with the maximum feasible educational benefit in the least restrictive setting. The IEP incorporates all essential program components outlined in the last BSEA decision, and includes additional services in accordance with information obtained since the last hearing. The proposed placement at Keefe Vocational Technical High School (Keefe) will address all of G. R.'s learning needs as identified by teachers and expert evaluators. Framingham has modified the scheduling and selection

(1) Prior to and during the course of the hearing a total of 189 documents were offered as exhibits. Objections were raised with regard to the admission of several of these documents. The Hearing Officer issued two rulings on the admission of documents, which are attached to this decision as Appendix A.

of courses to accommodate G. R.'s individual learning needs and preferences, and has supplemented the program with individually tailored community-job experiences. G. R.'s learning needs cannot be met at Framingham High School and the program proposed by Mrs. R. continues to be inappropriate for him.

PARENT'S POSITION

Parent's position fluctuated during the course of the hearing, but in her testimony Mrs. R. advocated for a fully integrated work study program at Framingham High School. According to Mrs. R., G. R. learns best through meaningful experiences and Keefe does not offer him enough opportunity for such experiences. In contrast, there are a vast amount of resources available at Framingham High School. G. R. should attend regular education courses at the high school during the morning and should participate in a community job placement in the afternoon. In both settings he should be accompanied by a 1:1 certified special education teacher, who would serve as language facilitator/job coach. In addition, G. R. should receive occupational therapy, have a computer consultant, and be supported by a "Circle of Friends". (2)

SUMMARY OF THE EVIDENCE

1. G. R. is an eighteen year old young man with autism. He exhibits significant impairments in communication and socialization skills, is hypersensitive to certain noises and shows abnormal responses to tactile stimuli. G. R. has difficulty processing abstract concepts and acquiring information presented only verbally. He is a visual learner who responds best to written instructions and concrete demonstration of tasks. G. R.'s academic skills cluster around the fifth grade level, however, he demonstrates enhanced performance on concrete tasks in areas of high interest. His handwriting skills are noticeably weak, consequently his work improves with access to a computer. G. R. has difficulty generalizing learning and therefore benefits from instruction imbedded in the natural context. He responds to structure and routine and works best in small groups. When anxious or under stress G. R. can resort to self-abusive or avoidance behaviors. (Exh. S-1, S-2, P-16, AP-89, P-78, P-94, P-77, P-80, P-160, testimony of Mrs. R., Quill, Cutler, Taft-Farrell, Ranley, Arena)

(2) "Circle of Friends" refers to a group of typical, age appropriate students who volunteer to accompany a disabled student to mainstream classes and activities, to provide models of age appropriate social and communicative behavior, and to support the disabled student's interaction with, and integration into, the regular school environment (P-16).

2. G. R. did not attend school at all during the 1990-1991 academic year, as Mrs. R. continually refused to consent to educational services for him. At Framingham's request, a hearing was held before the BSEA on the issue of the appropriate placement for G. R. for the 1990-1991 school year. Parent advocated for G. R. to attend regular education courses at Framingham High School with the support of a "Circle of Friends." Framingham advocated for a program prototype 502.4 placement at Keefe. In a decision issued on July 2, 1991 the Hearing Officer found that the Keefe placement proposed by Framingham was the least restrictive, appropriate educational placement for G. R. for the 1990-1991 school year, and, absent any compelling evidence of significantly changed circumstances, would continue to be appropriate for the 1991-1992 school year as G. R.'s placement. (Exh. P-16)

3. Framingham has proposed a program prototype 502.4 placement at Keefe for the 1991-1992 academic year. The program is focused on the enhancement of G. R.'s socialization and communication skills, and has three main components: 1. community/job experiences, 2. reinforcement of functional academic skills in a structured classroom setting, and 3. opportunities for socialization with typical peers.

The first main component of the program recommended by Framingham is community/job experiences. There are two parts to this component. First, G. R. would have a job placement in the community. Framingham, in consultation with Dr. Cutler and with the agreement of parent, identified the public library as an appropriate job site for G. R., and obtained a volunteer job for him there. G. R. would be responsible for cataloguing and shelving books. His work in the library would be reinforced in the functional academic portion of his program, where he would learn the Dewey decimal system, card cataloguing skills and so forth. The IEP calls for G. R. to participate in his job placement two hours a day, between three and five days per week.

Secondly, G. R. would participate in community activities designed to enhance daily living and socialization skills and facilitate his integration into the community. Examples of such activities are grocery shopping and visits to community resources such as the bird sanctuary. G. R. could also participate in an evening social group that engages in activities such as bowling and eating pizza. The IEP calls for G. R. to participate in community activities two hours per day for up to two times per week.

For the second main component of his program G. R. would participate in the Job Entry Training Program (JET) at Keefe. This is a program designed to assist special needs students gain competitive employment or employment in a sheltered workshop by the age of 22. Under the proposed plan G. R. would spend two periods per day in the JET resource room, where he would receive instruction in applied math, applied science, applied english and activities of daily living. G. R.'s functional academic

instruction in the resource room would reinforce the goals of his participation in community/job activities and selected regular education courses.

The third main component of G. R.'s program, opportunities for socialization with typical peers, would occur through G. R.'s participation in carefully selected regular education vocational courses and gym. Framingham, in consultation with Dr. Cutler, identified portions of the pre-voc arts cluster that would be appropriate for G. R.. The IEP calls for G. R. to begin taking two selected arts cluster courses per day. Framingham originally recommended adaptive physical education for G. R., but in response to parent's request modified the IEP so that it now provides for his participation in a carefully selected regular physical education course.

The program proposed by Framingham includes a 1:1 aide for G. R. The aide would accompany G. R. to classes and into the community and would serve as a language facilitator/job coach. This aide would be supervised by one of the certified special education teachers in the JET resource room. The IEP calls for G. R. to receive one hour of occupational therapy per week and for the occupational therapist to provide consultation in both home and school. The IEP states that the speech and language therapist will consult with staff regarding her recommendations and provide suggestions for concrete implementation.

Framingham's proposed plan calls for consultation by an autism consultant. Dr. Taft-Farrell testified that the purpose of this consultation is threefold: first to provide staff training on autism, second to assist in the implementation and shaping of G. R.'s program on an ongoing basis, and third to develop a "Circle of Friends" for G. R. Framingham has suggested that G. R. pursue his interest in music through community group bands, and has agreed to facilitate this by providing parent with pertinent available information. Finally, Framingham has offered to provide counseling services to G. R. to facilitate transition and re-entry into a school setting. (Exh. S-4, P-236, testimony of Taft-Farrell, Ranley, Mrs. R., Cutler)

4. During the late summer and fall of 1991 there were at least nine TEAM meetings held in an effort to develop an educational plan for G. R. (P-219) Although Mrs. R. did not accept any proposed IEP, G. R. did attend Keefe for approximately six weeks in September and October 1991. G. R. was absent for all of November. On December 9, 1991, Mrs. R. signed an interim educational plan and G. R. attended Keefe for three days (S-3). On December 12, 1991 Mrs. R. apparently withdrew her consent to the interim plan, and once again removed G. R. from school. As of the close of the hearing, G. R. was still not attending school.

During his brief placement at Keefe, G. R. attended the JET resource room two periods per day and spent two periods in

regular education pre-vocational clusters. In the early fall he participated in selected portions of the technical cluster, and later he participated in selected portions of the arts cluster. G. R. also participated in a small group adaptive physical education class. He was given access to a computer in the math lab, and an electric typewriter was made available to him in the resource room. In December, Framingham, with the assistance of Dr. Cutler, secured a job placement for G. R. at the public library.

During the fall of 1991 Dr. Cutler was hired by Framingham to serve as the autism consultant. Keefe staff worked extensively with Dr. Cutler, and amended the curriculum for G. R. in accordance with her recommendations. G. R. related well to the group of children with whom he was placed in the resource room. He seemed happier in the early fall. During the three days he attended school in December, G. R. seemed to be having some difficulties, and told staff that he would not be attending Keefe for any longer than two more weeks. (Ranley, Cutler, Arena)

G. R. did engage in some brief incidents of self-abuse during the time he spent at Keefe, and also had such an incident at his job placement at the library. There were fewer incidents in September, when G. R. had the most consistent attendance. Keefe staff worked with Dr. Cutler to learn how to best handle any self-abuse behaviors exhibited by G. R. At Dr. Cutler's suggestion, Keefe staff used appropriate techniques, such as asking G. R. what was upsetting him and providing choice answers to facilitate his response. At the advise of Dr. Cutler, Keefe staff also started sending G. R. to the school nurse at the end of the school day, rather than immediately following a self-abusive incident, so as not to reinforce the negative behavior. (Cutler, Ranley, Arena)

Keefe has a rotating A week/B week schedule, under which regular education students take academic classes one week and vocational courses the next. As a result, G. R. interfaced with two different groups of students during his mainstream classes. He also worked with two different teachers in the resource room. This did not appear to present problems for G. R.

When G. R. attended Keefe, his program was focused on the enhancement of communication and socialization skills. Keefe staff used the techniques suggested by Dr. Quill and Dr. Cutler, such as the use of core lists and menus, to facilitate G. R.'s use of language. Because G. R. stopped attending school, Framingham did not have the opportunity to implement all of the modifications suggested by Dr. Cutler. (Ranley, Cutler, Arena, Taft-Farrell, see also P-81, P-82, P-83)

5. At this hearing Mrs. R. took essentially the same position that she took at the last hearing; that is, G. R. should attend regular education courses at Framingham High School in the morning (and possibly from 2 to 5 P.M.) and should participate in a job placement and community activities in the afternoon. The only changes in her position since the last BSEA hearing are the

suggested addition of occupational therapy services, a computer consultant, and a 1:1 certified special education teacher to accompany G. R. throughout the day. An occupational therapy evaluation was completed on October 21, 1991 (Exh. P-84, S-1), and Framingham's proposed IEP includes occupational therapy services. Mrs. R. provided no details on the function of the computer consultant in G. R.'s program. She testified that the 1:1 special education teacher would be a communication facilitator/job coach, who would modify curriculum and make decisions in the community. Mrs. R. gave no further description of the special education services, if any, that G. R. would receive at the high school.

Mrs. R. was not able to give a detailed description of what her proposed placement would be like for G. R. on a day to day basis. She indicated that he would attend three courses and work in the community. According to Mrs. R., G. R.'s "core" courses at the high school would be business math and career english, and he would attend other mainstream courses in subjects that he likes, such as music or photography. G. R. would be supported through these classes by a "Circle of Friends." Mrs. R. could not describe where and how preparation for a community job placement would take place in her proposed program at the high school, other than to say "it should be a TEAM process."

Mrs. R testified that she visited the high school for approximately four hours and came up with 28 courses that would be "wonderful" for G. R. Mrs. R. did not observe any classes at the high school. During her visit she reviewed the curriculum, spoke to a guidance counselor, a home economics teacher, office people, three students, and cafeteria staff. Mrs. R. does not know the size of the classes she is recommending for G. R., and had no information concerning the instructional methods or the academic materials used in those classes.

Mrs. R. testified that it was "laborious" to find appropriate classes and activities for G. R. at Keefe, and that the program there was inappropriate for him. According to Mrs. R. the type of courses at Keefe do not match G. R.'s competency areas and the academic instruction in the resource room is beneath G. R.'s level of functioning. Mrs. R. testified that she does not know what G. R.'s current levels are, but they are not accurately reflected on standardized testing. Mrs. R. has requested new independent evaluations, which she believes are "essential."

Mrs. R. acknowledged that a great deal of planning and training was done at Keefe for G. R. She testified that there were numerous meetings held at Keefe, that G. R.'s plan was revised several times, and that although staff at Keefe did their best job, "it just wasn't working." Mrs. R. observed G. R. at Keefe on December 12, 1991, the last day he attended school. At the time, G. R. was attending Keefe under an interim educational plan that Mrs. R. had accepted on December 9, 1991. (S-3) Mrs. R. testified that she did not know how the program she observed

differed from the interim educational plan. Mrs. R. could not say with any specificity which, if any, services on the proposed IEP she had accepted.

6. The only other testimony that Mrs. R. offered in support of her proposed placement was that of Dr. Barbara Cutler. Dr. Cutler is a consultant, who testified on mother's behalf at the last BSEA hearing. (P-16) Her resume appears at Exh. S-7. In the past, Framingham has hired Dr. Kathleen Quill to provide the autism consultation component of G. R.'s program. Because of illness, Dr. Quill was not available in the fall of 1991, and so Framingham hired Dr. Cutler in her place.

During the fall of 1991, Dr. Cutler spent approximately thirty hours providing training and consultation regarding G. R.'s program at Keefe. However she has only observed G. R. in School once. That observation took place on October 7, 1991 at Keefe. Dr. Cutler was at Keefe for approximately 2 1/2 hours on that date, and spent approximately 1 1/2 hours with G. R.

During that time Dr. Cutler did not observe G. R. in any ongoing classroom. Because there was "a lot going on" in the resource room during her visit, Dr. Cutler accompanied G. R. and his aide to the school library and observed G. R. working on assignments there. She also observed G. R. in the cafeteria. Dr. Cutler visited the technical cluster at Keefe to see G. R.'s work product, and spoke with the teacher in the arts cluster, but again she did not observe G. R. working in these, or any, classrooms.

On October 16, 1991 Dr. Cutler wrote a report entitled "Evaluation of G. R. (for the purpose of developing an integrated program in Framingham public schools)" (Exh. P-67) That report, along with Dr. Cutler's testimony, provides information concerning her October 7, 1991 observations at Keefe.

With regard to the pre-vocational clusters, Dr. Cutler testified that G. R.'s drafting product was better than she expected given G. R.'s poor motor skills. While she would not recommend drafting for G. R., the product indicated that he was able to participate in the drafting section of the technical cluster. Dr. Cutler testified that in her opinion G. R. would do well in the electrical portion of the technical cluster, because wiring is a highly visual activity. She also felt that there was a high probability that G. R. would succeed in and benefit from the commercial art and photography portions of the arts cluster. Her report notes that there were activities in the arts cluster workroom that would be of great interest and suitability for G. R. given his strong visual memory (i.e. use of printing machines.) Dr. Cutler testified that the arts cluster teacher was most agreeable to working with G. R. and modifying the class to meet G. R.'s needs. She noted that he was willing to allow G. R. to participate in selected portions of the cluster, and to repeat the cluster if that would meet his needs. Dr. Cutler's October 16, 1991 report states "There are clearly pieces of

different clusters [at Keefe] that would be of educational value to G. R.. The goal should be in finding good experiential and educational opportunities for G. R. rather than trying to fit him into whole clusters which he must complete."

With respect to her observations of G. R. in the cafeteria at Keefe, Dr. Cutler testified that G. R. sat at a lunch table at the edge of a group of students and, although he had minimal social interaction, he did not isolate himself from the group. G. R. was able to proceed to class independently when the bell rang at the end of lunch. In her October 16, 1991 report, Dr. Cutler states, "At all times [G. R.] appeared calm and his behavior was appropriate...He [was] able to function independently in the halls and cafeteria (coming and going, waiting, eating), he [was] comfortable and able to be part of a group of his non-handicapped age-appropriate peers, and his physical presence in the group at all times indicate[d] an interest in being part of a social group." Dr. Cutler goes on to note that G. R.'s lack of social interaction, clearly demonstrated his need for education and support by staff and friends in the areas of difficulty for autistic children; namely social interaction and communication.

As to her observations of G. R. and his aide in the library, Dr. Cutler found that G. R. and his aide had a good rapport and that G. R. was cooperative in completing his assignments. Dr. Cutler indicated in her report that G. R. was doing work on commercially prepared workbooks, which do not lend themselves to real comprehension and retention of information by G. R.. However, she noted that Keefe staff were working to develop more appropriate activities for G. R. Dr. Cutler's report states that the aide assigned to G. R. had developed a good basic understanding of G. R.'s style and needs. "[The aide's] approach is calm, responsive and respectful...she has wisely avoided hovering about G. R. (which he doesn't like and which if he learned to tolerate would increase dependency); but is available to provide help to G. R. when he needs it."

Dr. Cutler's October 16, 1991 report concludes with several recommendations, the first of which is "that Keefe be G. R.'s designated school since he appears comfortable in the building, knows his way about, and has supportive staff who are interested in learning more about G. R., his unique cluster of disabilities, and about autism."

Dr. Cutler testified that none of the recommendations that she made in her October report could be implemented, because G. R. stopped attending school in mid October (also testimony of Ranley). Dr. Cutler conducted no further observations of G. R. She testified that she continued to provide consultation and training at Keefe throughout October and November even though G. R. was not in school.

On November 6, 1991 Dr. Cutler observed a regular education gym class at Keefe, which she thought would be inappropriate for

G. R. G. R. has never participated in that class. Framingham originally arranged for G. R. to take walks with his aide in accordance with parent's request, and then recommended an adaptive physical education class (Taft-Farrell). Dr. Cutler observed the regular education gym class on November 6, 1991 because parent was requesting that G. R. participate in a regular education gym class.

On November 26, 1991 Dr. Cutler and G. R.'s aide went to the public library to set up a job placement for G. R. Dr. Cutler testified that this was an appropriate job site for G. R., as he liked the library and had expressed an interest in being a librarian. Dr. Cutler suggested that the job be volunteer until G. R. was viewed as competent. Dr. Cutler did not give the aide any specific training on how G. R. should be prepared for the placement or on how the placement should be implemented even though she knew the aide would be G. R.'s job coach.

In early December, Dr. Cutler sent Framingham a copy of her psycho-educational evaluation of G. R. and her recommendations for an interim plan for him (Exh. S-2 and P-171). On December 2, 1991, Dr. Cutler attended a TEAM meeting aimed at developing an interim plan and IEP for G. R.. Dr. Cutler testified that the plan that was developed (S-3) was essentially word for word what she recommended. The only component that she had recommended that was not included in the interim plan was her suggestion that G. R. be allowed access to a bilingual computer lab located across the hall from the JET resource room. The plan called for G. R. to have use of a computer, but not 100% use via access to this lab as suggested by Dr. Cutler. In all other respects the plan followed her recommendations. Dr. Cutler noted that in her work at Keefe the staff was always cooperative and responsive to her suggestions for modifications to G. R.'s program, and that to her knowledge the suggested access to the bilingual computer lab was the only modification that they did not adopt.

G. R. attended Keefe under the interim plan for three days, December 10 through 12, 1991, then Mrs. R. withdrew G. R. from school once again. Dr. Cutler conducted no observations of G. R. or the program during his three days of attendance. She testified that ongoing problem solving and modification would be necessary in any educational program developed for G. R., and that three days was not enough time to implement modifications and recommendations.

When Dr. Cutler testified on January 3, 1991, she stated that her opinion had changed and she now felt that it wouldn't work out at Keefe, and the high school would better meet G. R.'s needs. Dr. Cutler was unable to give a clear explanation as to what made her opinion change, other than to say that the regular education gym class she viewed on November 6, 1991, which G. R. never attended, was inappropriate, and the high school curriculum guide had a focus on computer literacy. Dr. Cutler had no intervening observations of G. R. in any school setting.

Dr. Cutler's knowledge of the high school is limited to a review of the high school catalogue and curriculum guide and a 2 1/4 hour visit to the high school that she made in December (see P-180, P-181). During that visit Dr. Cutler had a cursory view of various settings in the high school and listened to chorus practice. She did not conduct any meaningful observation of any ongoing classes at the high school. She is not familiar with the methods of instruction or curriculum materials used in the classes she selected for G. R., and testified that she therefore doesn't know if those classes are appropriate for G. R. She also is unfamiliar with the size and layout of the classes. When asked to describe a typical day for G. R. at the high school she said that the most appropriate part of the building is the business area because there are computers there. She testified that she had not planned a school day for G. R. and could not describe one. She also testified that the rotating schedule at the high school presents a problem, and noted that students seemed confused by it and that regularly missing class sessions would obviously effect G. R.'s need for continuity. Finally, Dr. Cutler testified that she has no experience adapting a regular education curriculum in a public high school to meet the needs of an autistic child.

7. Kathleen Quill, is an autism consultant (her resume appears at P-86), who has known G. R. since he was approximately eight years old. In 1983, Dr. Quill was collecting data on language functioning from students at the League School, and G. R. participated in her studies. When G. R. was at Higashi School he again participated in research conducted by Dr. Quill. In the Spring of 1989, Mrs. R. requested that Dr. Quill conduct an independent evaluation of G. R. and Framingham agreed to pay for the evaluation. In June 1989, Dr. Quill conducted a comprehensive psychoeducational evaluation of G. R. The report stemming from that evaluation contains a description of G. R.'s skills, inventories of his language, social skill and academic repertoires, a description of his learning style and recommendations for programming (AP-89). After the evaluation, and up until the summer of 1991, when she stopped working due to illness, Dr. Quill was under contract with Framingham to provide technical assistance to staff working with G. R. According to Dr. Quill's testimony, she assisted in two ways; first, helping staff understand G. R.'s unique learning needs and the environmental modifications that were necessary to support his learning, and second clarifying the recommendations made through her evaluation. This work involved multiple visits to the program G. R. was in during the 1989-1990 school year and multiple meetings with the TEAM. During 1990-1991 G. R. was not in school. Dr. Quill saw him at one or two autism meetings and at a TEAM meeting. Since the BSEA decision issued in July 1991, Dr. Quill has seen G. R. one time on a social basis at the Northeast Regional Conference on Autism held in Portland, Maine, in October 1991. Dr. Quill also reviewed a packet of documents relating to G. R. including the BSEA decision issued in July 1991 (P-16), all of the reports stemming from the reevaluation of G. R. in the fall of 1991 (P-158, P-67, P-78,

P-84, P-159, P-79, P-99, P-88, P-77, P-160, P-31), assessments completed by staff at Keefe (P-81, P-82, P-83, P-100) and the IEP proposed by Framingham (S-4). A complete list of the documents reviewed by Dr. Quill appears on S-14. Dr. Quill has not reevaluated G. R. and has not observed him in a school placement since the spring of 1990.

Dr. Quill testified at the last BSEA hearing, and as noted, she reviewed the decision issued in July 1991, which found that the 502.4 placement at Keefe proposed by Framingham would offer G. R. the maximum feasible educational benefit in the least restrictive environment. Dr. Quill testified that the July 1991 BSEA decision accurately incorporated her recommendations and that nothing she saw in the reevaluation reports should alter that placement decision. According to Dr. Quill, adding a 1:1 special education teacher to the program proposed by Mrs. R. at the last hearing does not make it an appropriate program for G. R. Dr. Quill testified that even with the addition of an individual special education teacher to work with G. R., the placement at Framingham High School proposed by Mrs. R. does not address the full spector of G. R.'s educational needs.

Dr. Quill testified that given that G. R. has not been in school, the recommendations that she made in 1989 have not been addressed in any formal consistent way over the last two years. Therefore, Dr. Quill testified that G. R.'s needs are basically the same today as they were in 1989 and the educational recommendations that she would make today are almost identical to those that she made in 1989, and again in 1990 and again in 1991. Those recommendations are essentially as follows: G. R.'s program needs to incorporate three basic components; vocational and community opportunities, functional academics, and opportunities to have access to typical peers for the enhancement of his social skills. The first two components overlap, as functional academics should ideally be taught through both real life experiences and the reinforcement of specific skills in a structured classroom environment. This is the gist of the recommendations that Dr. Quill has made consistently now for almost three years.

Dr. Quill testified that G. R. could not receive the functional academic instruction he needs by taking regular education courses at Framingham High School in subjects such as music, photography and drama. Dr. Quill also testified that it would be inappropriate to place G. R. in a regular education high school academic class such as math or english, as the curriculum of such a class would not meet G. R.'s needs. While G. R. could be in a regular education high school academic class if he had his own teacher and curriculum and was working completely independently from the other students, Dr. Quill sees no merit to such parallel programming. She stated that integration should have social and language benefits, and those would be missing in a high school classroom, where a group of regular education students were doing one thing and G. R. was in the same place, doing something very different. Dr. Quill testified that when

she recommended access to typical peers for G. R. she did not mean physical proximity, she meant interaction. G. R. needs to be supported in acquiring conversational and social skills with his peers. He needs to be with peers in a context where social exchanges can happen. According to Dr. Quill, it would be best to integrate G. R. with non-handicapped peers in curriculum areas that are not academically based, because there is a discrepancy between G. R.'s academic levels and the academic levels of the peers, and so therefore, his curriculum needs are different from those of his peers. Dr. Quill testified that it is most appropriate for G. R. to be with his peers in a setting where there can be meaningful exchanges between students and the information being presented is equally meaningful and germane to all the students involved. Dr. Quill testified that Mrs. R.'s proposal to have G. R. attend regular education high school classes with his own teacher and a parallel curriculum, and attend a community job placement would neither meet G. R.'s need for social involvement with typical peers, nor provide the best context for G. R. to acquire the functional academic skills he needs.

Dr. Quill testified that consistency is an issue for G. R. One characteristic associated with autism is anxiety. According to Dr. Quill, researchers in the field believe that you can decrease the anxiety of autistic students by establishing a routinized, consistent set of goals and expectations within a set environment. Change, confusion and disorganization provoke anxiety which is the precursor to many of the behavior problems seen in autistic children. Dr. Quill testified that G. R. might be able to adapt to a constantly changing schedule, such as the rotating schedule at Framingham High School, if adaptations were made (i.e., his schedule was written out, an organizational chart was developed) and he were prepared ahead of time so he knew where he had to be. However, Dr. Quill testified that there would be a problem if there was a curriculum sequence and G. R. only attended every other class because of the rotating schedule and his job placement. This would make the information he was receiving totally confusing. According to Dr. Quill that situation would not work for any child including G. R. Dr. Quill testified that attending school on an irregular basis would effect G. R.'s performance, and not knowing from day to day where he was going to be would create stress for him. She testified that G. R. has a history of fleeing or becoming self-injurious when he is anxious.

Dr. Quill testified that because of illness, she was not available to participate in the process of developing the 1991-1992 IEP for G. R., and was not available to comment on the IEP until the hearing. She testified that the 1991-1992 IEP proposed by Framingham would meet G. R.'s needs, if it were ammended as follows: First, Dr. Quill's June 1989 report recommends that G. R. develop skills in specific areas, and while some of these areas are included in the functional academic portion of the IEP, others are not included or are only partially included. Dr. Quill testified that the areas that are not

included in the IEP are, library and reference skills, money skills, time management skills, and skills for banking and finance. The areas that are only partially included in the IEP are writing scripts on the computer, acquiring skills around health care and nutrition, and skills around food preparation and clothing purchasing and care. (Dr. Quill noted that several of the behavioral objectives recommended in her report are included in the functional academic portion of the IEP, including functional word recognition, measurement skills for cooking and life skills, telephone skills, reading skills around job applications, job interviews, and job expectations and rules, and steps to take in specific emergencies.)

Secondly, according to Dr. Quill the IEP should be amended so that functional academic skills and pragmatic communication skills are addressed separately. Dr. Quill noted that certain behavioral objectives listed in the functional academic portion of the IEP are actually language and communication goals. For example, the second objective in the functional academic portion of the IEP is that G. R. will "develop short scripts of appropriate conversations noted in the day's experience." According to Dr. Quill, this is an appropriate goal, but it is a pragmatic communication goal. Pragmatic communication goals are an important component of G. R.'s education plan, and Dr. Quill feels they should be outlined and monitored separately from functional academic goals. Dr. Quill also indicated that the communication portion of the IEP should be elaborated by including the specific behavioral objectives outlined in the speech and language report written by Nancy Bradlee. Dr. Quill explained that it is important to assess how G. R. is communicating in different social contexts and to assist him in elaborating his communication in those contexts. It is important to see, for example, how G. R. requests clarification on information and how he requests assistance from a peer, and whether or not he is doing these things in a variety of contexts. If not, they should be targeted as specific communication objectives. According to Dr. Quill, G. R. does not need individual speech and language therapy. She indicated that it would be helpful to have a speech/language therapist knowledgeable in the area of pragmatics, such as Nancy Bradlee, consult weekly with G. R.'s teacher and aide, and guide them in being language facilitators for G. R. Finally, Dr. Quill testified that it would be useful for G. R. to have access to a computer all the time.

Dr. Quill testified that she reviewed the section of the IEP focused on communication and found that the teaching approach and methodology described there was appropriate for G. R. and in keeping with her recommendations. She testified having G. R. attend regular education pre-vocational clusters at Keefe could fulfill his need for access to typical peers, in that the nature of that setting is one in which there can be meaningful exchanges among peers. Dr. Quill testified that the IEP would meet her recommendations in the area of functional academics, if it were amended to include all of the skill areas listed in her report.

She also testified that the IEP adequately and appropriately addresses her recommendation for job and community opportunities.

Dr. Quill testified that since G. R. has good skills in math and reading, he might be an appropriate candidate for a G.E.D. program (a tutorial aimed at the acquisition of academic skills necessary to obtain a high school equivalency diploma). Having a G.E.D. could increase employment opportunities for G. R. Dr. Quill thought of this when she was preparing to testify at this hearing. She suggested that Framingham might add a G.E.D. tutorial to the functional academic classroom portion of G. R.'s program. This would simply be an additional area of curriculum for G. R., and it would not change Dr. Quill's recommendations regarding all other aspects of G. R.'s program.

Dr. Quill testified that the A week/B week schedule at Keefe would not be a problem for G. R., so long as his schedule is clearly outlined, and he knows where and with whom he is supposed to be each day. Dr. Quill testified that she would not be available to provide the autism consultant services called for in the IEP until the 1992-1993 school year. She indicated that she is only available two days this school year, on March 26, and on another day in May. According to Dr. Quill, if Framingham hired her on March 26, 1991, her time would best be used organizing G. R.'s week, establishing what behavioral objectives will be addressed in each block of time and orienting staff as to what modifications they need to make to enhance G. R.'s ability to be comfortable in each setting. Dr. Quill testified that she does not need to reevaluate G. R., because he has not been in school since her last evaluation.

8. The postures assumed by Mrs. R. during the course of this dispute are relevant to a final determination, so I review them briefly:

As indicated, the hearing concerning the appropriate program for G. R. for the 1990-1991 school year did not conclude until after the close of that year. Mrs. R. refused to expand the scope of the hearing, so that the placement which was found to be appropriate could be implemented in the 1991-1992 school year.

9. Mrs. R. refused to consent to special education services for G. R. during the summer of 1991. She agreed to have him attend a regular education computer class at Framingham High School. (P-19)

10. At least nine TEAM meetings were held during the summer and fall of 1991 (P-219). Mrs. R. did not accept any proposed IEP. G. R. attended Keefe for approximately six weeks in September and October 1991 without a signed educational plan.

11. G. R. stopped attending school in October 1991, and Mrs. R. requested a hearing solely on the issue of procedural violations allegedly committed by Framingham.

12. In response to Mrs. R.'s request for a hearing, Framingham filed interrogatories, asking parent to specify in detail the procedural violations that she was alleging Framingham committed.

13. Mrs. R. filed an answer to Framingham's interrogatories which fails to articulate in any coherent way what, if any, procedural violations have been committed by Framingham and how those alleged violations have effected G. R.'s right to a free appropriate public education.

14. On November 14, 1991, Framingham filed a Motion to Compel Answers to Interrogatories and a Motion to Dismiss. The Hearing Officer heard arguments on these motions, as well as on parent's Objection to Interrogatories and Motion for a Protective Order on November 19, 1991.

15. On November 25, 1991, the Hearing Officer issued an order stating that the hearing would proceed in a bifurcated fashion, with the initial stage focused exclusively on the issue of G. R.'s placement for the 1991-1992 school year. The sole question which would be decided at that hearing was what placement will offer G. R. the maximum feasible educational benefit in the least restrictive setting for the 1991-1992 school year. The order states that following a decision on the issues of placement the hearing could proceed to a second stage focused exclusively on alleged procedural violations, but that prior to a second hearing the Hearing Officer would issue rulings on Framingham's Motion to Dismiss, Framingham's Motion to Compel Answers to Interrogatories, Parent's Motion for a Protective Order, and on any objections to documents offered as exhibits for a hearing on alleged procedural violations. The parent objected to the decision to bifurcate the hearing, and at various stages throughout the hearing objected to a proceeding focused on the issue of G. R.'s placement.

16. On December 9, 1991, Mrs. R. signed an interim education plan (S-3). G. R. attended Keefe under the proposed IEP from December 10 through 12, 1991. On December 12, 1991, Mrs. R. sent Dr. Taft-Farrell a four-page letter (P-175) which propoerts to accept in part and reject in part the IEP proposed by Framingham for the 1991-1992 school year (S-4). While the letter is at best unclear, it appears that Mrs. R. was again rejecting the placement at Keefe and requesting placement at Framingham High School. G. R. stopped attending Keefe on December 12, 1991.

17. Between the third and fourth day of the hearing, Mrs. R. typed a letter which states "December 30, 1991 To whom it may concern: Concerning G. R.: I have discussed G. R.'s educational matters with his mother, [Mrs. R.] In G. R.'s best interest I recommend G. R. receive all of his special education and related services through a home instruction program at this time until matters of his educational placement are fully resolved. Sincerely, Margaret Peppercorn, M.D." Dr. Peppercorn signed this letter (P-203, testimony of Mrs. R.)

18. On the evening before the fourth day of the hearing. Mrs. R., through her attorney, contacted the Hearing Officer to request a continuance because of an emergency of some unspecified nature. The request was denied. At that time, and again the next day at the onset of the fourth day of hearing, Mrs. R. asserted that there was no longer a case before the BSEA because a temporary placement in the home was required by G. R.'s doctor, and Framingham's failure to provide it was a non-compliance issue that parent decided to handle through the complaint management system of the Department of Education. She argued that she could elect to go through the complaint management system, and also that the Hearing Officer had no jurisdiction over the issue of a home placement, therefore there was nothing before the BSEA.

Again, at the beginning of the fourth day of the hearing. Mrs. R. argued that the hearing on the issue of G. R.'s placement should be put off pending various events, including further TEAM meetings, and an independent evaluation. The Hearing Officer denied the request for the continuance and did not terminate the hearing.

19. At the fifth and final day of the hearing, when Dr. Taft-Farrell was testifying as the last witness, Mrs. R. handed her a note stating that she accepted the educational plan in full and would bring G. R. to school the following day. (P-244). Dr. Taft-Farrell testified that Gail Arena, who had been G. R.'s 1:1 aide, was no longer employed by Framingham, and that if G. R. were going to attend school, a new aide would have to be hired to work with him.

20. Following the close of the hearing, the parent elected not to submit a written closing argument, but instead submitted two letters to the Hearing Officer. These letters are attached to this decision as Appendix B and C. The first letter, dated February 7, 1992, is entitled "Notice That Initial Stage of the Hearing is Moot (3)". In it parent states that in her note to Dr. Taft-Farrell, parent withdrew her request for a home placement and accepted the IEP proposed by Framingham "in total and without qualification, until the start of the 1991-1992 school year." According to parent, this acceptance rendered the initial stage of the hearing moot. The letter goes on to state that parent continues to believe that "maximum feasible benefit in the least restrictive environment can be achieved at Framingham High School,

(3) Framingham filed an Opposition to Parent's Notice of Mootness, which is attached to this decision as Appendix D. [N.B. Copies of documents in Appendixes are only attached to copies of decision sent to parties for reasons of confidentiality]

but not at Keefe Technical School." However, "with extreme frustration the parent felt forced to accept the IEP offering placement at Keefe...until the start of the 1992-1993 school year," because the parent understood from Dr. Taft-Farrell's testimony that a placement at the High School could not be implemented until the start of the 1992-1993 school year. The letter then goes on to state that even though the IEP had been accepted in total, G. R. was not in school because of continuing procedural violations by Framingham. The parent then states that it is crucial to proceed to a hearing on the alleged procedural violations. (Appendix B)

The second letter sent to the Hearing Officer after the close of the hearing is dated February 11, 1992 (Appendix C). In this letter parent withdraws her request for a hearing on alleged procedural violations.

FINDINGS AND CONCLUSIONS

There is no dispute over the fact that G. R. is a student with special learning needs, as defined by M.G.L. c. 71B and 20 U.S.C. ss.1401, et seq. and is therefore, entitled to receive a free appropriate public education. The controversy here centers on which educational program is appropriate for G. R. for the 1991-1992 school year, the Keefe placement proposed by Framingham or the Framingham High School placement advocated for by the parent. After a careful consideration of all the evidence presented in this matter, I find that the program prototype 502.4 IEP proposed by Framingham, modified slightly in accordance with this decision, is reasonably calculated to provide G. R. with the maximum feasible educational benefit in the least restrictive setting. My reasoning follows:

I attribute great weight to the findings and recommendations of Dr. Kathleen Quill. Dr. Quill, who is an expert in evaluating and designing educational programs for people with autism, conducted a psychoeducational vocational evaluation of G. R. in June 1989. The parties concur that the report stemming from Dr. Quill's evaluation contained an accurate and comprehensive portrait of G. R.'s learning needs and appropriate programmatic recommendations. I find that, in the words of Dr. Cutler, "Dr. Quill's 1989 evaluation and recommendation are excellent, still pertinent, and should be the basis of educational planning for G. R." Dr. Quill has known G. R. for over ten years and demonstrated a genuine interest in his well-being. She reviewed all of the evaluations conducted during the summer and fall of 1991, and testified that there is no need for her to conduct another evaluation of G. R., since he has basically not been in an ongoing educational program since her last evaluation. I find that the recommendations made by Dr. Quill in 1989 remain valid, and that, for the most part, the plan proposed by Framingham meets those recommendations.

First and foremost, the plan proposed by Framingham incorporates Dr. Quill's central recommendation that G. R.'s program should

contain three primary components: 1. job placement and activities in the community, 2. vocational training and reinforcement of functional academic skills in a structured classroom setting, and 3. opportunities for socialization with typical peers. With regard to the first component, the parties do not dispute that the public library is an appropriate job site for G. R. Unfortunately, he only attended the placement for two days, not long enough to assess how it was working, make any necessary adjustments, or plan supportive curriculum material. The parties concur that the difficulties G. R. exhibited during his second day at the library do not make the placement inappropriate, and agree that additional job preparation would be helpful to G. R. (Mrs. R., Taft-Farrell, Cutler) It is the autism consultant who should be responsible for outlining with the teacher and aide the specific steps that should be taken to prepare G. R. for his work at the library. The autism consultant, in conjunction with the teacher and aide, should also regularly assess how G. R. is functioning in his job, and suggest modifications to the placement and amendments to the supportive classroom work as needed. Framingham's proposed plan also includes appropriate community activities that lend themselves to the acquisition of functional academic skills. Again because of G. R.'s sporadic attendance he only participated in a limited number of such activities. When G. R. did participate in community activities, he enjoyed himself and performed well (Ranley).

The plan proposed by Framingham also provides a structured classroom for vocational training and the reinforcement of functional academic skills in accordance with Dr. Quill's recommendation concerning the second key program component for G. R. I find that the JET resource room at Keefe meets this recommendation. The class is geared to assisting G. R. and the other students achieve successful job placements and integration into the mainstream community. (Ranley, Leonard) As a self-contained classroom it has the special education staff and the flexibility needed to address functional academics. Dr. Quill testified that the academic portion of G. R.'s program incorporated many of the behavioral objectives identified in her report, most importantly the acquisition of specific vocational skills (i.e., job-interviewing, filling out applications, conducting yourself in a work setting, personal time management, organizational skills, etc.)

The plan proposed by Framingham also includes the third main program component recommended by Dr. Quill, namely access to typical peers for the enhancement of communication and social skills. I find that this recommendation would be met through G. R.'s participation in selected portions of the regular education pre-vocational clusters at Keefe. G. R. would be with non-handicapped students in a context that lends itself to meaningful exchanges among peers. The information being taught in a photography or commercial art class at Keefe would be equally germane and meaningful to G. R. and the other students. G. R. would be working side by side with his peers

in a situation where interaction is likely to occur. The evidence presented at the hearing indicated that G. R. performed well in selected portions of the pre-vocational clusters at Keefe, and that placing him there was appropriate and in keeping with Dr. Quill's recommendations (Quill, Cutler).

I find that the program proposed by Framingham meets the core recommendations of Dr. Quill, incorporates the components outlined in the last BSEA decision, and includes additional services in accordance with information obtained since the last hearing. As Dr. Quill testified, nothing in the reevaluations conducted since the last hearing would lead to an alternative placement decision. I find that Framingham has been willing to modify the curriculum and adjust the program at Keefe to meet G. R.'s learning needs, and that Keefe staff cooperated with the autism consultant and were responsive to her suggestions.

In contrast, there is virtually no credible evidence to support parent's proposed placement at Framingham High School. The only expert testimony offered in support of parent's proposed placement was that of Dr. Cutler. In mid-October, Dr. Cutler recommended that Keefe be G. R.'s placement, but her position had changed when she took the stand at the hearing and recommended a placement at Framingham High School. This shift in Dr. Cutler's position is inexplicable, and her testimony in support of parent's proposed placement is without foundation. In the time that she changed her mind concerning G. R.'s placement, Dr. Cutler did not conduct any further observations of G. R. in any school setting. She continued to work with Keefe staff, who she described as cooperative and responsive to her suggestions. Dr. Cutler observed one regular education gym class at Keefe, a class which G. R. had never attended. It was parent who had requested a regular education gym class for G. R., in spite of Framingham's recommendations to the contrary. Dr. Cutler has not conducted any meaningful observation of classes at Framingham High School. She has no knowledge of the size of the classes at the high school that she would recommend for G. R., or of the instructional methods or curriculum materials used in those classes. I find Dr. Cutler's testimony in support of parent's proposed placement completely unpersuasive.

Parent's testimony in support of a placement was equally unpersuasive. She too had no knowledge concerning the size of the classes she was proposing or the instructional methods or curriculum materials used in those classes. She was unable to describe a typical day for G. R. in her proposed placement, or articulate the nature of the special education services, if any, that he would receive.

The evidence that was presented at the hearing indicates that a placement at Framingham High School is completely inappropriate for G. R. The only information on the record concerning classes at Framingham High School suggests that many are large, and use a lecture format and commercially prepared workbooks. (Taft-Farrell) Even Dr. Cutler acknowledged that these factors

would make the classes inappropriate for G. R.. The rotating schedule at the high school presents several problems for G. R., perhaps the most significant of which is that he would periodically miss class sessions. The resultant confusion and lack of consistency would be detrimental to G. R., increasing his anxiety and potentially fueling behavioral difficulties. It would appear that the noise and activity level in the corridors and cafeteria at the high school would be difficult for G. R. given his tactile defensiveness and sensitivity to auditory stimuli. Finally, placing G. R. in regular education classes at Framingham High School would be contrary to the recommendations of Dr. Quill. Dr. Quill testified that attending regular education high school classes would not provide G. R. with opportunities for meaningful interactions with typical peers. There is a discrepancy between G. R.'s academic levels and those of the other high school students, so G. R. would have to work on a parallel but separate curriculum. It would be unlikely that he would have ongoing exchanges with the other students. The placement would therefore not address G. R.'s primary area of need, the enhancement of social and communication skills. Dr. Quill testified that regular education classes at the high school would not provide G. R. with the vocational training and functional academic instruction that he needs. Nothing in the record suggests that G. R. would benefit from parent's proposed placement.

Because of illness, Dr. Quill was not able to directly participate in the development of the 1991-1992 IEP or comment on its contents prior to the hearing. Her testimony suggests that the following four amendments to the IEP would be beneficial to G. R.:

1. G. R. should have ready access to a computer. According to Dr. Cutler's testimony, this could easily be accomplished by allowing G. R. access to the computer lab located across from the JET resource room at Keefe. Framingham may elect to provide G. R. with a terminal in the resource room or in another convenient location.

2. The functional academic portion of the IEP must include all of the behavioral objectives identified in Dr. Quill's evaluation of June 1989. The summary of Dr. Quill's testimony on page 15 of this decision identifies the areas that need to be added or extended.

3. Communication objectives must be listed separately from functional academic objectives on the IEP, and shall be identified more specifically. This can readily be accomplished by incorporating Ms. Bradlee's recommendations concerning pragmatic communication goals into the communication section of the IEP.

4. The IEP shall provide for a weekly consultation by the speech and language therapist, rather than consultation as needed.

I find that with these four amendments the IEP proposed by Framingham for the 1991-1992 school year is reasonably calculated to provide G. R. with the maximum feasible educational benefit in the least restrictive setting, and shall be implemented immediately.

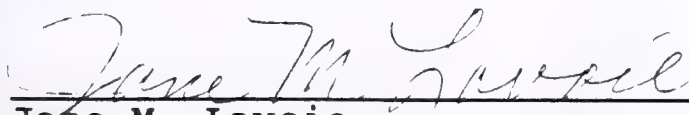
I also take this opportunity to rule on Framingham's Motion to Dismiss parent's request for a hearing on procedural violations allegedly committed by Framingham. I find that parent was given an opportunity to articulate the nature of the alleged procedural violations both in writing when she responded to Framingham's interrogatories, and verbally at the hearing on the Motion to Dismiss, but she was unable to do so. I find that Framingham has made extraordinary efforts to provide G. R. with the free appropriate public education to which he is entitled, and that the parent has continuously sabotaged those efforts.

I find that it is the behavior of the parent, rather than any alleged procedural violation committed by Framingham, that has prevented G. R. from receiving the services that he needs and deserves. The parent has continually resisted and attempted to undermine efforts to complete a hearing on the substantive issue of what placement is appropriate for G. R. She has abused the hearing process and demonstrated an inability to act in her son's best interest. Neither federal nor state laws entitle parent to a hearing on alleged procedural violations that is devoid of any substantive merit. Framingham's Motion to Dismiss is allowed. The remaining motions taken under advisement in November 1991, are moot.

ORDER

The program prototype 502.4 IEP proposed by Framingham for the 1991-1992 school year, amended in accordance with this decision, is reasonably calculated to provide G. R. with the maximum feasible educational benefit in the least restrictive setting and should be implemented immediately. Framingham's Motion to Dismiss parent's request for a hearing on alleged procedural violations committed by Framingham is allowed.

By the hearing officer:



Jane M. Lavoie LCB

Dated: March 19, 1992

3/6/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: RUSSELL V.

BSEA #92-1085

DECISION

This decision is issued pursuant to M.G.L. c. 71B, 15, and 30A, 20 U.S.C. ss.1401-1461, 29 U.S.C. s.794 and the Regulations promulgated under these statutes. A hearing was held in the above-entitled matter on February 12, 1992, at Braintree High School, Braintree, MA. Those present for all or part of the proceedings were:

Carol F.	Parent
Constance Corson	Advocate for Parent
Lorraine Zimmerman	Special Education Director, Braintree Public Schools
Michael Malone	Principal, Liberty School, Braintree
Lindsay Byrne	Hearing Officer, BSEA

The official record of the hearing consists of documents labeled S-1 through S-36, and approximately ninety minutes of recorded oral testimony. The parties made oral arguments in support of their respective positions at the hearing, and the record closed on February 12, 1992.

ISSUE

Whether the independent evaluation requested and obtained by the parent should be provided at the expense of the Braintree School Committee pursuant to 603 CMR s.28.0, par. 328?

PARENT POSITION

The parent asserts that she has fulfilled all criteria set out in 603 CMR s.28.0, par. 328 for public funding of an independent evaluation of her son: she disagreed with the results of the Braintree public school evaluation; she made timely requests, orally and in writing, for an independent evaluation to the Director of Special Education; she requested an independent evaluation equivalent in type and scope to the assessments performed by Braintree; and arranged for the independent evaluation to be conducted at an approved facility.

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SCHOOL'S POSITION

Braintree argued first that it was not obligated to fund an independent evaluation because the parent requested an assessment, a neuropsychological examination, that was not equivalent to the type of assessments that had been or could be performed by the public school. Alternatively, Braintree argued that it had assessed all areas of the student's suspected special need, and thus that the parent was not entitled to further assessment of those areas at public expense. (See 603 CMR s.28.00, par. 328.3(b).)

SUMMARY OF THE EVIDENCE

1. On May 17, 1991, Ms. F. requested a special education evaluation of her first grade son (S-14). He had been previously evaluated in 1989, his kindergarten year (S-30). The official evaluation request form was returned to the school on September 19, 1991. (S-3) In addition, Braintree received two referrals for a special education evaluation from the student's physician in September, 1991. (S-12, S-13). Braintree arranged for or conducted a medical assessment (S-11), an academic assessment (S-21), a family/social history (S-22), a psychoeducational evaluation (S-23), a speech/language assessment (S-23a), a reading report (S-24), a classroom performance assessment (S-25) and a math assessment. The Team met on October 21, 1991, and considered these assessments as well as prior evaluations in the student's file. (e.g. S-16,).

2. The Team issued a finding of no special needs on October 23, 1991. Ms. F. signed the notice on October 28, 1991, indicating that she wished to postpone acceptance or rejection of the Team's findings until an independent evaluation had been completed. (S-17). Receipt of Ms. F.'s request for an independent evaluation was acknowledged by Braintree on November 6, 1991. (S-18; see also S-6)

3. Ms. F. and the Director of Special Education, Ms. Zimmerman, had several phone conversations throughout the fall, 1991, in which Mr. F. stated her intention to take the student to Children's Hospital for a comprehensive evaluation of his learning style and abilities, and requested that Braintree fund the evaluation. (Ms. F., Ms. Z.)

4. Ms. Zimmerman stated that the public school would not fund an independent evaluation in this case, because the parent requested a neuropsychological evaluation of the student's possible attention deficit hyperactivity disorder (ADHD) status. Ms. Zimmerman stated that such an evaluation would be outside the scope of any assessments performed by Braintree and thus not "equivalent" under the regulations. Furthermore, additional diagnostic explorations would not add to Braintree's knowledge base or alter the interventions it had in place to accommodate the student's learning needs.

Ms. Zimmerman also stated that the public school was not obligated to fund an independent evaluation in a case where, as here, all areas of a student's suspected area of need had been evaluated by the public school, so that further assessments would be redundant. (Zimmerman)

FINDINGS AND CONCLUSIONS

Based on the preponderance of the evidence before me at the hearing, and the clear regulatory language and intent, I find that Braintree Public Schools is required to fund the comprehensive independent evaluation of the student requested by the parent.

The Massachusetts regulation governing public funding of independent evaluations requested or arranged by parents was redrafted in 1991 to add language consistent with the federal regulation permitting school systems to request hearings to determine their fiscal responsibility for such evaluations, under limited circumstances. 603 CMR s.28.0, par. 328; 34 CFR 503. This clarification strengthened, but did not change, the intent of the original regulation. School systems are obligated to fund nearly every parental request for an independent evaluation. Only when the school can prove in a hearing that a.) it has comprehensively assessed all possible areas of a student's suspected learning need, and b.) the type of assessment requested by the parent is far outside the scope of the student's suspected area of need, can the school be relieved of its financial obligation, 603 CMR s.28, par. 328.3(b), and then perhaps only prospectively. (See 603 CMR s.28.0, par. 328.5, 404.1, 2, 3.)

In this matter, neither of the inconsistent arguments offered by Braintree in support of its decision to deny public funding of the student's independent evaluation, is persuasive. First, the argument that the parent requested a neuropsychological examination that was not equivalent to the assessments performed by the school is not supported by evidence in the record. On the contrary, the evidence shows that the parent arranged for an evaluation substantially similar in type (evaluation of learning style and abilities) and scope (she did not include an occupational therapy assessment which was recommended by a physician because the school had not performed one, for example), as that performed by the school. There is no evidence that the parent intended or chose an assessment outside of the student's area of suspected need.

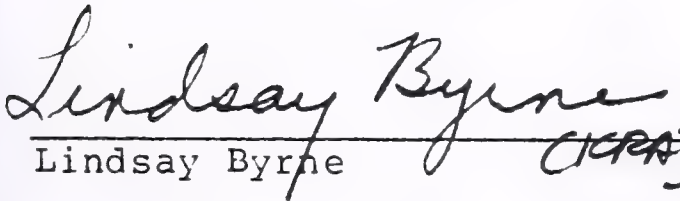
Second, the argument advanced by the school that, because it had evaluated all areas of the student's suspected disability, it could not be held responsible for repeat assessments in the same areas, represents a misreading of the regulations. State and federal regulations on independent evaluations in fact require that they be "equivalent" to those performed by the school. This allows a comparison of perspectives based on similar material. The parent need not proffer a reason for the request for the

independent evaluation. The school's team evaluation may be thorough, comprehensive, and accurate, and still the parent is entitled to an evaluation of the student elsewhere.

ORDER

Braintree Public Schools is responsible, pursuant to 603 CMR s. 28.0, par. 328.0, for funding the independent evaluation requested by, and arranged by, Ms. F., in the fall, 1991. Braintree must reimburse Ms. F., for any out-of-pocket expenses associated with the independent evaluation secured by her.

By the Hearing Officer:


Lindsay Byrne *(CICRA)*

Dated: March 6, 1992



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

4/2/92

IN RE: BRIAN D.

BSEA # 92-1094

DECISION

This decision is issued pursuant to M.G.L. c. 15, 30A and 71B, 20 U.S.C. ss. 1401 - 1461, 29 U.S.C. s. 794 and the regulations promulgated under those statutes. A hearing was held in the above entitled matter on March 16, 1992 at Arlington High School in Arlington, MA. Those present for all or parts of the hearing were:

Ms. M.
Brian D.
Marilyn Bisbicos

Jon Pike

Naomi Lown

Miriam Freedman

Jane M. Lavoie

Parent
Student
Director of Special Education,
Arlington
Special Education Liaison,
Arlington
Consultant to Reach-Up
Program, Arlington
Attorney for Arlington

Hearing Officer, BSEA

The record consists of documents submitted by the school, marked S-1 through S-13 and approximately two hours of recorded oral testimony. Ms. M. appeared pro se, and Arlington was represented by Attorney Miriam Freedman. The parties agreed to make oral closing statements at the hearing on March 16, 1992 and the record closed on that date.

ISSUES

Is the program prototype 502.2 Individualized Educational Plan (IEP) proposed by Arlington for the 1991-1992 school year reasonably calculated to provide Brian the maximum feasible educational benefit in the least restrictive setting?

SCHOOL'S POSITION

The 502.2 IEP proposed by Arlington is reasonably calculated to provide Brian with the maximum feasible educational benefit in the least restrictive setting, and the BSEA should order that it be implemented in full. All TEAM members, with the exception of parent, agreed that Brian would benefit from continued special education services. Evaluators at the Thom Clinic concur that

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Brian needs a combination of mainstreaming and special education. Arlington can provide all of the services called for in recent evaluations of Brian, but has been unable to do so because the parent specifically rejected special education services pending a BSEA hearing. Therefore, while Brian is attending the resource room one period per day, he is not receiving the assistance he needs and his performance is deteriorating.

PARENT'S POSITION

It is impossible for Brian to receive a fair hearing before the BSEA, therefore this case should be "farmed out" to another agency. Arlington and the BSEA have delayed the hearing process and Brian has been forced into an overly restrictive special education setting through threats and coercion by Arlington's special education director and the principal of Arlington High School. Parent does not dispute that Brian needs the services called for in the IEP, but claims that Arlington cannot provide them in-house. Therefore, Brian should be removed entirely from the special education program at Arlington High School, and outside tutors should be hired to provide the services recommended by Thom Clinic evaluators.

SUMMARY OF THE EVIDENCE

1. Brian is a 17 year old boy, whose intellectual functioning is in the high average range. He demonstrates good reasoning and processing of information, but has difficulty with organization and would benefit from assistance with study skills. Brian has a history of traumatization, including physical and sexual assault at an early age, and has been diagnosed as suffering from Post Traumatic Stress Disorder. In the past, Brian has been physically threatening to himself and others, but he is not currently exhibiting any significant behavioral difficulties (S-4).
2. From September 1990 through January 1991, Brian attended the Wediko residential treatment center in Windsor, New Hampshire. In late January 1991, Brian was placed at Lakeshore Hospital in Manchester, New Hampshire, for psychiatric observation following an incident in which he threatened self-harm with a knife. Staff at Lakeshore determined that Brian was in danger of losing control and placed him in physical and medicinal restraint. Discovering this, parent removed Brian from the hospital. (S-4, S-13)
3. In February 1991, parent contacted Arlington and requested a fully mainstreamed program for Brian at Arlington High School. From March through May 1991, Brian received home tutoring while TEAM meetings were held in an effort to develop an educational plan for him. Arlington recommended a program prototype 502.5 day placement for Brian and sent referrals to several schools. Parent rejected the proposed placements. (S-4, S-13)

4. During the summer of 1991, two mediation sessions were held. Arlington suggested that Brian might be an appropriate candidate for the Reach-Up program at Arlington High School. This is a special education program for students coming into the high school from more restrictive settings. Brian was accepted into the Reach-Up program and started attending it in September 1991. Arlington claims that parent agreed to this placement. There is no signed IEP in the record. (S-13, testimony of Bisbicos)

5. In October 1991, parent took Brian to the Thom Clinic for a reevaluation. The School Functioning Unit Team of the Thom Clinic conducted a comprehensive evaluation of Brian in the fall of 1990. Parent requested a new evaluation in the fall of 1991 in order to assess and compare Brian's current level of functioning to that of a year ago. At the time of the previous evaluation Brian was enrolled in the Wediko residential treatment center. As indicated, in the fall of 1991, Brian was attending the Reach-Up program at Arlington High School.

The personality component of the evaluation, completed by Stephen Bonsignore-Berry, indicated that Brian's psychological profile had improved. Brian did not show evidence of symptoms sufficient for the assignment of any specific psychological disorder except Post Traumatic Stress Disorder. Dr. Bonsignore-Berry emphasized that Brian's improved level of psychological functioning should not be interpreted as a complete remission of symptoms or evidence of firm psychological recovery. Rather, test and interview results indicated that Brian is in the process of recovery and has demonstrated positive movement in that process. The evaluation indicated that Brian had developed his use of coping strategies, with avoidance tactics replacing aggressive tendencies as a primary mode of coping. Assessment results also suggested that Brian's affect was better modulated. As in the prior assessment, Brian continued to demonstrate a tendency towards over-involvement with self, however, this tendency had decreased somewhat. Dr. Bonsignore-Berry found that Brian's psycho-sexual development was delayed, and that his level of functioning was at a preadolescent stage. Dr. Bonsignore-Berry again noted that Brian's developing psychological skills are new, fragile and not yet consolidated. He recommended that Brian continue to live at home and receive a combination of mainstream and self-contained classroom academic experience with tutoring. He also recommended that Brian continue his involvement in individual psychotherapy. (S-4)

Dr. John Warner conducted the neuropsychological component of Brian's reevaluation. Dr. Warner found that Brian was functioning in the high average range across the board with respect to levels of intellectual attainment. Previous testing suggested some weaknesses in the area of short term memory, but those weaknesses did not appear in the reevaluation. In fact, Brian performed in the above average range on the Wide Range Assessment of Memory and Learning. In general, the results of the behavioral checklist suggested that Brian was not exhibiting any significant behavioral difficulties either at home or in

school. (S-4)

Ms. Fran Zimmerman conducted the educational component of Brian's reevaluation. Ms. Zimmerman found that all of Brian's academic skill levels were within the average range. Brian demonstrated good reasoning and processing of information. According to Ms. Zimmerman, an area of potential difficulty for Brian is that of organization of information. She noted that this is frequently a problem for many high school students, but may be more so for Brian because of his impulsive style and anxiety. According to Ms. Zimmerman, it would be in Brian's best interest to work with a learning specialist on reading, notetaking, summarizing, test preparation, and test taking skills. Each of these areas needs to be addressed through examples, questioning, modeling, and rehearsal within a small teaching group. Ms. Zimmerman indicated that it is most important for Brian to have structure in his learning from textbooks. She noted that previewing, summarizing, reciting, revising and writing are necessary to developing expressive written language. According to Ms. Zimmerman, Brian would benefit from learning notetaking skills. These skills will help him develop main ideas for tests of essay writing, and recognize details as needed for objective tests. (S-4)

6. On December 10, 1991, a TEAM meeting was held. Arlington proposed a program prototype 502.4 IEP calling for Brian's continued participation in the Reach-Up program at Arlington High School. On December 31, 1991, parent rejected the proposed IEP. (S-2) In the section provided for parent response, on the second to last page of the IEP, Ms. M. wrote, at the end of several comments, that she was formally requesting a BSEA hearing. The rejected IEP was received by the BSEA on January 8, 1992. Ms. M. did not send any other written request for a hearing to the BSEA.

7. On January 8, 1992, parent sent Arlington a letter directing that Brian be removed from special education services, and requesting a reconvening of the TEAM. (S-5)

8. On January 22, 1992, a TEAM meeting was held to assess Brian's progress and modify the IEP. At that meeting the parties agreed that Brian would continue with the classes and teachers that he had the previous term for periods 1, 2, 3, and 4. The parties also agreed that Brian was ready for more mainstreaming. Members of the TEAM from Arlington felt that Brian should maintain special education services for academic support and counseling. (S-1)

On February 3, 1992, Arlington sent parent a copy of the program prototype 502.2 IEP that it was proposing for Brian as a result of the January 22, 1991, TEAM meeting. (S-1) Arlington also sent parent a letter outlining two suggested options for the remaining class periods. Both options call for two additional mainstream classes and one period in the resource room for academic support.

The IEP proposed by Arlington calls for Brian to receive basically three special education services. First, Brian would attend a resource room one period per day to receive assistance in study and organizational skills (summarizing, notetaking, analyzing, reading and test taking). There would be between six and eight students in the resource room, and these students, like Brian, have program prototype 502.2 educational plans. None of the other students in the resource room proposed for Brian are currently in the Reach-Up program. Brian would be grouped with two to three of the other students and would be taught by Mr. Tassone, a certified special education teacher with 15 years of experience. Ms. Bisbicos testified that in the resource room Brian would receive all of the services recommended by Ms. Zimmerman. According to Ms. Bisbicos, Mr. Tassone might not utilize the specific methodologies suggested by Ms. Zimmerman (i.e., the SQ3R method, the Cornell method), but he would provide Brian with the recommended assistance in the skill areas in which he needs help (previewing, summarizing, reciting, revising, notetaking, and so forth, see S-4).

Secondly, the IEP calls for Brian to receive academic tutoring two to three times per week. The IEP identifies John Warden as the tutor. Mr. Warden has worked with Brian during his placement at Arlington High School. The two have an excellent relationship and Mr. Warden has been of great assistance to Brian. (Brian, Bisbicos) Unfortunately, Mr. Warden is a pre-med student, who is only available to work with Brian one hour per week now, from 5:30 to 6:30 A.M. Arlington is willing to pay for Mr. Warden's services and is also willing to hire another academic tutor to work with Brian.

Thirdly, under the plan proposed by Arlington, Brian would be offered counseling services. Parent indicated that Brian needs counseling but is currently resisting it. Arlington originally listed Dr. Rodolico as the counselor for Brian, however, parent objected to this service provider because he is currently working with one of Brian's siblings. Arlington then proposed that Naomi Lown provide counselling services to Brian. Ms. Lown is not working with any of Brian's siblings and she has a particular expertise in Post Traumatic Stress Disorder. (Bisbicos, S-12)

9. On January 8, 1992, the BSEA received a copy of the IEP that Ms. M. had rejected on December 31, 1992. (S-2) As indicated, Ms. M.'s request for a hearing appears in the section for parent response on the second to last page of the IEP.

10. On February 11, 1992, a prehearing conference was held at Arlington High School. On that date, Ms. M. wrote on the response page of the IEP proposed by Arlington (S-1) that she rejected the following portions of the educational plan: "The choice of counselor, student profile, teaching approach and methodology, monitoring and evaluation techniques, specialized equipment, materials and personnel, failure to incorporate Thom Clinic evaluators recommendations and texts." Ms. M. also wrote the following comments on the IEP: "The resource room is

accepted only until a hearing before a BSEA officer or other Justice takes place under the so-called "OPTIONS ONE" described in the letter of 2/3/92 from Ms. Bisbicos."

11. Since February 11, 1992, Brian has followed the afternoon schedule outlined as option one in the February 3, 1992 letter from Ms. Bisbicos to Ms. M. (S-1) Brian has been attending the resource room during period six, but has not been receiving any services there, because Arlington took Ms. M.'s comments on the IEP to be a rejection of services pending the hearing. (Bisbicos, Brian)

12. During the course of this school year, the classes that Brian has taken at Arlington High School include Latin, Chemistry, Trigonometry, and Creative Writing. During the first two marking periods he generally obtained grades of A and B (the exceptions are a C+ in trigonometry during the first marking period and a C in Chemistry during the second marking period. (See S-9). Recent reports from teachers indicate that while his grades are down somewhat, his behavior, classwork, homework and attitude are generally excellent. (S-10)

13. Brian testified that he wants to learn as much as he can so that he can go to college and obtain a decent education. He indicated that his placements outside of the public school have not been helpful to him. According to Brian, his tutor, John Warden, has been quite helpful. Brian explained that it is easier for him to learn when Mr. Warden teaches, because Mr. Warden takes more time explaining things. Brian testified that he has been working with Mr. Warden for over a year and that when he was seeing Mr. Warden three times per week he was maintaining an A/B average. Now Mr. Warden can only work with Brian once a week and Brian's grades have dropped to B's and C's. Brian indicated that he recently scored a D on one of his tests.

Brian testified that his mainstream classes are orderly, and that teachers do not allow any acting out or horseplay. Brian indicated that he is not receiving any services in the resource room. During the one period per day that he attends the resource room, Brian either sleeps, does homework, or listens to his walkman. According to Brian, students mill about, argue and act out in the resource room, and the teacher could exert more discipline.

Brian testified that other students have made derogatory remarks about the fact that he receives special education services, and that he has been involved in at least one incident in which a regular education student called him a "sped" and hit him.

Brian testified that he needs to learn study and writing skills, but has not been taught those skills at Arlington High School. Brian indicated that Fran Zimmerman has recently begun to teach him study and writing skills. Brian would like to exclude sixth and seventh period from his schedule, and leave the high school during those times to work with Ms. Zimmerman and another tutor.

FINDINGS AND CONCLUSIONS

After a careful review of all the evidence presented in this matter, I find that the 502.2 IEP proposed by Arlington for the 1991-1992 school year is reasonably calculated to provide Brian with the maximum feasible educational benefit in the least restrictive setting. My reasoning follows.

First, it is important to note that if there is a dispute in this case, it is an extremely narrow one. For the most part, the parties are in agreement concerning Brian's educational plan. They agree that Brian should attend mainstream classes at Arlington High School. They agree that he has performed well and should continue in the courses that he is currently taking during the first five periods of the day. There is no dispute over the fact that Brian would benefit from the three basic services called for in the IEP, namely, academic tutoring, support with organization and study skills, and counseling. The evidence indicates that these are the services that Brian needs.

The controversy here apparently centers on where and how Brian will receive support with organization and study skills. Parent contends that Arlington has not and cannot provide this service in-house, and should therefore hire an outside provider who will employ the exact methodology suggested by Ms. Zimmerman of the Thom Clinic. Arlington acknowledged that it has not been providing this service, but claims that is because parent specifically rejected that portion of the IEP. Arlington contends that it can provide this service in the resource room one period per day, and that it should not be required to utilize only the approach and books suggested by Ms. Zimmerman.

There is nothing in the record to suggest that Brian could not receive the assistance he needs with organization and study skills in the resource room proposed by Arlington. The evidence indicates that Brian would be placed in a small group of similar peers and would receive instruction from an experienced teacher. Ms. Bisbicos testified that Mr. Tassone can and will work with Brian on reading, notetaking, summarizing, test preparation and test taking skills in accordance with Ms. Zimmerman's recommendations. Ms. Zimmerman's report specifically states that each of these skills needs to be addressed through examples, questioning, modeling, and rehearsal within a small teaching group. Ms. Bisbicos indicated that this would occur in the resource room.

She also testified that Brian would work on previewing, summarizing, reciting, revising and writing in the resource room to assist the development of his expressive written language. Finally Ms. Bisbicos indicated that the resource room instructor can teach Brian notetaking skills that will help him develop main ideas for essay tests and recognize details for objective tests. I find that so long as these central recommendations are met, Arlington is not required to utilize the specific methods (SQ3R,

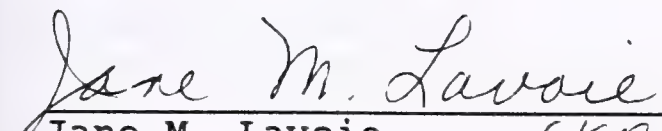
Cornell) or tests ("How to Study," "Writing with a Point") mentioned in Ms. Zimmerman's report. There is no evidence indicating that these are the only or the most appropriate methods to use in assisting Brian with organization and study skills. I find that it is unnecessary and overly restrictive to send Brian to an outside service provider, when he can obtain the services he needs in an appropriate setting within the public high school.

It is distressing that while evaluators, parent and the local school district essentially concur on the services that this child needs, he has not been receiving them. Brian impressed the Hearing Officer as a child who is eager to learn and perform well in high school, and anxious to pursue college studies. While he has done remarkably well in school this year, his grades are starting to deteriorate, because services have been held up during the course of this dispute. There is no question that Brian has benefited from individual tutoring with John Warden. While it is unfortunate that Mr. Warden is not more available to work with Brian now, it is Arlington's responsibility to immediately locate another tutor to supplement Mr. Warden's work and provide the full range of individual academic support called for in the IEP. This order will enable Arlington to immediately implement the resource room services described above. While parent indicated that Brian is presently resistant to counseling, the parties agree that he needs it. There was no evidence to indicate that Ms. Lown would be inappropriate as a service provider. It is hoped that with the resolution of this dispute, Brian will be able to benefit from counseling, as well as from the other services called for in the IEP.

ORDER

The IEP proposed by Arlington for the 1991-1992 school year is reasonably calculated to provide Brian with the maximum feasible educational benefit in the least restrictive setting and shall be fully implemented immediately.

By the hearing officer:


Jane M. Lavoie (KRA)

April 2, 1992

7/22/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: RICHARD L.

BSEA #92-1196

DECISION

This decision is issued pursuant to M.G.L. c.71B, 30A and 15, 20 U.S.C. ss.1401-1461, 29 U.S.C. s.794, the regulations promulgated under those statutes. A hearing was held in the above-entitled matter on June 18, 1992, at the Southern Worcester County Regional Vocational Technical High School (hereinafter "Bay Path") in Charlton, MA. Those present for all or part of the proceedings were:

S.L.	Parent
R.L.	Parent
L.M.	Grandparent
Robert Kirk	Independent Psychologist
Robert Duncan	School Psychologist, Tantasqua Regional School
Janice Johnson	District School Psychologist - Bay Path
Deborah Nowers	Special Education Director - Tantasqua
Julian MacDonnell	Special Education Director - Bay Path
Carla Grimes	Home Tutor
Patricia Parsons	Advocate for the Student
Frank Morgan	Attorney for the School
Lindsay Byrne	Hearing Officer, BSEA

The official record of the hearing consists of documents submitted by the parents labelled P-1 through P-18, exhibits offered by the school marked S-1 through S-23, and approximately 7 hours of recorded oral testimony. Both parties made oral closing arguments at the close of the evidence. The record therefore closed on June 18, 1992.

ISSUE

Whether the 1992-1993 individual education plan calling for Richard to transfer from the vocational program at Bay Path to a 502.4 program in his home school district, Tantasqua, is reasonably calculated to provide the maximum feasible educational benefit to Richard in the least restrictive setting?

44-190

PARENTS' POSITION

With specialized academic and behavioral support, Richard can build upon his interest in auto body repair and be successfully integrated into a mainstream vocational program. Richard is not dangerously assaultive or self-injurious. Bay Path has failed to offer reasonable accommodations to Richard's behavioral needs. The proposed IEP calling for placement in an academically oriented resource room program is inappropriate.

SCHOOL'S POSITION

Richard's dangerously assaultive and provocative behavior cannot be accommodated in a vocational setting where strict discipline and personal responsibility is necessary to ensure the safety of all students. Richard lacks the prerequisite social and attentional skills to be successful in a vocational program. He requires placement in a highly structured, behaviorally oriented program to develop necessary prevocational skills. Bay Path does not offer such a program.

SUMMARY OF THE EVIDENCE

This matter has a long and tortuous history. Much of the factual background, particularly that relating to special educational procedures, is in dispute. The parties agreed, however, to focus on those elements necessary to determine the appropriate placement for Richard for the 1992-1993 school year. Thus the following summary does not touch on every area of disagreement.

1. Richard is a fifteen-year-old, ninth grader currently enrolled in Southern Worcester County Regional Vocational School District, known as Bay Path. Richard has average intelligence, and grade level academic skills with a history of weakness in math. His most significant area of need is emotional/behavioral. Richard is self-absorbed and impulsive. He has verbal and physical behavior patterns which are antagonistic immature and aggressive. He has extremely poor peer relations. Richard works best in one-to-one and highly-structured, small group settings. He is exceptionally talented in the area of auto body repair and his success in that area provides positive reinforcement for improvement in behavior and learning. (Exhs. P-5, 6, 7, S-23, S-20, S-6, P-18; S.L., MacDonnell, Duncan, Johnson, Grimes.)

2. In the 1990-1991 school year, Richard attended a 502.4 junior high school class at Tantasqua Regional. He followed a structured behavioral program there and made good progress toward controlling his tendencies to taunt other students through teasing or threats. (Duncan) At a meeting on May 30, 1991, the TEAM agreed to a diagnostic placement at Bay Path. (Exh. S-1) The TEAM was concerned that Richard might not be ready to

transition to a large, open mainstream vocational setting from the small group classroom he had been attending. (Duncan, MacDonnell) At the end of the diagnostic period, however, the TEAM determined that Richard was appropriately placed at Bay Path. There had been no behavioral or disciplinary incidents during the first eight weeks. (Exh. S-1, MacDonnell) Richard was accepted as a full-time student at Bay Path and the TEAM proposed a 502.2 IEP for the remainder of the school year. (Exh. S-2) The IEP called for special education services in the area of math and study skills. There were no behavioral goals or objectives, no counseling, and no modifications to the regular discipline code. (Exh. S-22)

3. Immediately after the IEP was accepted Richard began to have disciplinary difficulties. (MacDonnell) In January, 1992, there were a series of incidents, including a serious one involving possession of a knife in shop class, that resulted in out-of-school suspensions, in-house suspensions, emergency evaluations, proposed amended IEPs, and eventually requests by the school to both the BSEA and the Court for assistance in determining an appropriate interim educational placement for Richard. (Exhs. P-1, S-3, S-4, S-5, S-7, S-8, S-10, S-11, S-12-16, S-18, S-20, S-21; S.L., MacDonnell) The actual events caused confusion, which were compounded by miscommunications and misunderstanding between the parents and the school. (Exhs. P-9, 12, 15, 17; S.L., MacDonnell) At the brink, the parties agreed to a home tutoring plan, pending the outcome of further evaluations and a BSEA hearing. (Exhs. S-17, 21; S.L., MacDonnell) Parental consent to the evaluations requested by the school was subsequently withdrawn. Richard completed the school year through academic tutoring at his home. (Grimes)

4. During the tumult, Richard underwent two psychological evaluations. Janice Johnson, school psychologist for Bay Path, evaluated Richard on January 8, 1992. She found that Richard would perform best in a highly-structured, small group educational setting which provided continuous behavioral feedback, as well as social skills and prevocational training. She specifically recommended that Richard receive his math instruction in a resource room and engage in individual and family counseling. Mr. Johnson made no finding that Richard was dangerous or assaultive, or could not be served in the vocational program at Bay Path. (S-6, Johnson. See also S-20.)

5. Robert Kirk, an independent psychologist, evaluated Richard over the course of three days in February, 1992. (Exh. P-18) Dr. Kirk also recommended resource room support for Richard's academics, as well as individual and family therapy. He also made a specific finding that Richard posed no danger to himself or others. (Exh. P-18, Kirk)

6. At a TEAM meeting on June 5, 1992, Bay Path proposed returning Richard to his home school district, Tantasqua, under a 502.4 IEP. (Exh. S-23) According to Mr. MacDonnell, Special Education Director at Bay Path, the reason for proposing that Richard return to Tantasqua was to permit immersion in a behavior modification program, so that Richard could acquire the social skills and work habits necessary for successful re-entry into the Bay Path program. He testified that no such behaviorally oriented program existed at Bay Path. He further stated that such a program would be inappropriate in a vocational school, because the safety of all the students is the paramount concern.

7. Deborah Nowers, Special Education Director for the Tantasqua Regional School District, was not involved in the development of the proposed IEP, but described the program contemplated under it. At the high school there are two classrooms in a separate wing which are staffed with one teacher and one and one half paraprofessionals each. The classrooms function as resource rooms with an academic focus. There are twenty to twenty-four students per class, most of whom follow 502.2 or 502.3 IEPs. Though there is some behavioral input for a few students that need it, none of the students have learning needs that are primarily emotional/behavioral in nature. There are no vocational offerings at Tantasqua. Industrial arts, a regular education offering, is not designed to teach prevocational skills. (Nowers; See also Duncan.)

8. Carla Grimes is Richard's home tutor, as well as a special education "generic consulting" teacher at Bay Path. She testified that there were four full-time resource rooms at Bay Path which address the academic and behavioral needs of a mix of 9th, 10th, and 11th graders. There are 5-12 students in a class per period with one teacher. Some of the students have learning needs that are primarily behavioral in nature. All the classes use a behavior management technique called "assertive discipline" which has several levels of redirection and intervention before regular discipline is imposed (Exh. S-22). In addition some students follow a modified discipline protocol allowing for, example, additional "cooling out" time or more frequent counseling visits. Ms. Grimes testified that, based on her contact with Richard in the past 3 months, Richard could function academically with such a behavioral approach.

FINDINGS AND CONCLUSIONS

There is no dispute that Richard L. is a student with special learning needs as defined by M.G.L. c. 71B and 20 U.S.C. 1401 et. seq., and is therefore entitled to receive a free, appropriate public education. There is no major disagreement about the nature and extent of Richard's special education needs, nor about the services that are best suited to meet those needs. The dispute is centered primarily on the setting in which

Richard's special education program will be delivered. After a careful review of all the evidence presented in this matter, and thorough consideration of the arguments advanced by the parties, it is my determination that the 502.4 IEP proposed by Bay Path is inappropriate for Richard. A new IEP providing comprehensive services to him at Bay Path must be developed.

The parties agree on the outlines of an appropriate educational plan for Richard: small group instruction for academics, a structured approach to teaching social and prevocational skills, a comprehensive behavior management program that includes ample time for "cooling out" and for consultation with a counselor, individual and family counseling, vocational programming in areas of interest to promote self-esteem, and an alternative plan that can be implemented immediately if the increased services to Richard prove insufficient. (Grimes, Johnson, Kirk, Duncan, MacDonnell, S.L.) These elements, with the exception of vocational programming and designation of an alternative site, appear in the proposed IEP. (Exh. S-23) Indeed, the proposed IEP is carefully and attentively drawn with accurate descriptions and appropriate interventions. It provides a good model for service design and a springboard for the development of an individually tailored behavior plan. There is no reason it cannot be implemented at Bay Path.

Bay Path argued that Richard's behavior was too dangerous to permit him to remain in a vocational program. The preponderance of the evidence does not support that argument. Neither psychologist found Richard to be an ongoing danger to himself or to his community. (Johnson, Kirk) Despite the knowledge that Richard's primary learning need was his impulsive and alienating behavior, no goals or interventions in this area were included in Richard's 1991-1992 IEP. Therefore, it is impossible to predict whether appropriate behavioral programming will be able to address the areas of concern to Bay Path. Ms. Grimes, whom I found to be an exceptionally credible and forthright witness, described a classroom routine and disciplinary system that not only meets the recommendations of the psychologists, but mirrors the language in the proposed IEP. Further, she stated without hesitation that behavioral issues were the primary learning difficulties for some of her students, who are nonetheless successfully maintained at Bay Path. Given her testimony that some of the vocational instructors also have special education certification, it is clear that a highly individualized, comprehensive special education program addressing all of Richard's needs and assets can in fact be designed and implemented at Bay Path. (Grimes, MacDonnell) I have no confidence that an appropriate program could be delivered at Tantasqua, since it currently lacks both behavioral programming and vocational options. (Nowers, Duncan)

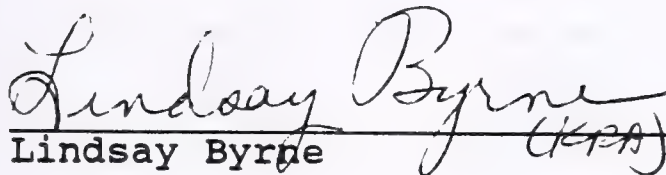
Equally important, as the lack of factual support for Bay

Path's intended transfer, is the regulatory imperative to retain him in his current school. (See 603 CMR s.28.0 337.4) Public schools are required to make serious and substantial efforts to modify existing regular and special education programs and to create new services, if indicated, to meet the unique learning needs of their students with disabilities. Vocational schools are not exempt from this requirement. (See 603 CMR s.28.0. 202.2) I am not persuaded that, in this matter, Bay Path offered or provided all that it could have done to address Richard's escalating behaviors, or to reintegrate him into the school community. It should seize the opportunity to try again. As a starting point, the proposed IEP must be redrafted to include: carefully monitored vocational classes and shops; additional 'crisis counseling'; a description of an individualized behavior plan to be implemented across settings; and, regular meetings with TEAM members to discuss successes and failures in meeting Richard's needs. In addition, to prevent the kind of confusion and interruption Richard experienced in his schooling this past year, the TEAM must develop a "fall back" IEP which could be implemented immediately after an Emergency TEAM meeting, if and when a clearly defined limit has been reached.

ORDER

The 502.4 IEP developed by Bay Path proposing a return to the Tantasqua Regional High School is not reasonably calculated to provide the maximum feasible educational benefit to Richard in the least restrictive setting. The TEAM is ordered to develop a new IEP or IEPs consistent with this decision.

By the Hearing Officer,


Lindsay Byrne (KPA)

Dated: July 22, 1992

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Lennell H.

BSEA #92-1216

DECISION

This decision is rendered pursuant to Massachusetts General Laws, Chapter 30A, 71B, U.S.C. 1400 et seq., and the regulations promulgated pursuant to such statutes.

A prehearing was held on the above-numbered case on February 12, and 19, 1992 at the Department of Education, 1385 Hancock Street, Quincy, MA. By agreement of the parties, this decision is based on the stipulations and documents provided to the Hearing Officer on February 19, 1992; the parties waived the right to a BSEA hearing. It should be noted that the stipulations refer to the exhibits as school exhibits, however, it was agreed at the prehearing conference that they be entered as joint exhibits, and are so entered. The record remained open until March 6, 1992 for receipt of closing arguments.

Persons present for all or part of the prehearing conferences were:

Susan Stelk	Educational Advocate for Lennell H.
Helen Murphy	Foster Parent of Lennell H.
Caroline White	Director of Special Services, Milton Public Schools
Mary Ellen Sowyrda	Attorney for Milton Public Schools
Gordon Weiner	Psychologist, Parents and Childrens Service
Abby Raelin	Psychologist, Milton Public Schools
Ann Callanan	Social Worker, Milton Public Schools
Margaret Ward	Special Education Chairperson, Milton Public Schools
Marie Frederic	Social Worker, Department of Social Services
Marien Evans	Attorney for Boston Public Schools
Nan Coellner	ETL Boston Public Schools
Patricia Crowley	Manager of Compliance, Boston Public Schools
Kathleen Mullen	Classroom Teacher
Margaret Gibbons	School Nurse
Sandra Sherwood	BSEA Hearing Officer

ISSUES

I. Whether Milton Public Schools (hereafter, Milton) has standing to request a hearing before the BSEA in regards to Boston's implementation of Milton's proposed 502.6 prototype IEP for Lennell H.

II. Whether Boston Public Schools (hereafter, Boston) is responsible for implementing Milton's 502.6 prototype IEP for Lennell H. for the February, 15, 1992 - February, 14, 1993 period.

III. Whether Boston has the right to conduct evaluations and develop its own IEP for Lennell H.

IV. Whether Milton has fiscal responsibility for the 502.6 prototype IEP from February, 1992 through June 30, 1992, pursuant to the Ch. 766 "move in" regulation, s. 332.3.

POSITION OF MILTON

Milton has standing to bring this case before the BSEA, for Milton is responsible for educating Lennell in the current setting until the 502.6 prototype placement is secured. Further, it is Milton's IEP for which Milton seeks compliance. Therefore, Milton has an interest in the outcome of this appeal and is appropriately the party bringing this appeal. Secondly, Boston is responsible for implementing the 502.6 prototype IEP immediately, pursuant to DOE's assigning programmatic and fiscal responsibility to Boston.

POSITION OF BOSTON

Milton has no standing to bring this case before the BSEA, for the issue is one of compliance; the appropriate party would be the educational advocate assigned to represent the child, yet she has not brought the case to appeal. Further, even if the case is properly before the BSEA, Boston should not be responsible for implementing Milton's 502.6 prototype IEP, for the assignment of LEA responsibility means that Boston has the right and responsibility to conduct its own evaluation and TEAM meeting to determine Lennell's educational needs. Finally, even if Boston is deemed responsible for implementing Milton's 502.6 prototype IEP, the move in regulation renders Milton fiscally responsible for the placement through June 30, 1992.

STATEMENT OF THE FACTS

Lennell H. is a seven year, eleven month young boy who has emotional and behavioral problems interfering with his cognitive functioning. He requires a therapeutic setting with integrated special education services in order that he maximize his

educational potential. (Joint Exh. 11)

2. Since September, 1990, Lennell has resided in Milton, MA. with Ms. Murphy, foster parent, and has attended the Milton Schools. Although the record is ambiguous, it appears that he has attended as a first grader and as a repeat first grader. (Joint Exh. 5). It should be noted that the IEP's state on the first page that he is a first grader, but the student profiles describe him as a kindergartener and a repeat kindergartener. (Joint Exh. 6, 8)

In the late fall, 1991, Milton conducted a full CORE evaluation in order to determine Lennell's educational needs. It convened a TEAM on December 4, 1991 and thereafter issued an IEP calling for Lennell's placement in a residential educational program. (School Exh. 6, 8)

3. As a result of this change in proposed educational and living placement to a residential school, Milton requested that a determination be made as to the appropriate local educational agency responsible for such IEP. Because there are no parents involved in this case, the Department assigned responsibility to Boston pursuant to the Chapter 766 Regulations, s. 202.1(c) and s. 202.1(e). (Joint Exh. 9)

4. Boston refused to implement the proposed 502.6 prototype IEP, asserting that it would conduct its own evaluation and team meeting, and that DSS could fully fund the residential placement if it so chose. (Joint Exh. 10)

5. In response to Boston's refusal to implement its proposed 502.6 prototype IEP, Milton requested a hearing before the BSEA.

6. Pursuant to the direction of the BSEA Hearing Officer, Milton obtained an educational advocate (Susan Stelk) and on February 12 and 26, 1992, reconvened its TEAM in order that the team meeting include the person who stands in for the child's parent and who has no agency involvement. (Joint Exh. 11) Ms. Stelk accepted this 502.6 prototype IEP, thereby agreeing that such placement is the least restrictive setting in which Lennell's educational development could be maximized. (Joint Exh. 11)

FINDINGS AND CONCLUSIONS

I. Milton has standing to bring an appeal to the BSEA in regards to the implementation of its 502.6 prototype IEP proposed for Lennell H. Given the fact that Milton is continuing to serve Lennell until this issue is resolved, and that Ms. Stelk, Educational Advocate, agrees with Milton's position, granting standing to Milton is the prudent course. To do otherwise would only forestall the process in order that Ms. Stelk obtain legal counsel to bring the issue before the BSEA. Given the importance

of resolving Lennell's educational placement as quickly as possible, such delay would be unwarranted.

II. Boston is responsible for implementing immediately Milton's 502.6 prototype IEP for Lennell H. The state regulation governing Boston's responsibility is very clear: The local school agency wherein the parents reside (or wherein the parents last resided), is responsible for the education of children who live and receive special education services at a private residential school ..., pursuant to s. 202.1(c) and s. 202.1(e). Although the stipulations do not specifically state that Lennell will be residing at the residential school, and will no longer reside with the foster mother on weekends, etc., Boston has not contested the 202.1(c) and 202.1(e) assignment. Therefore, it is assumed that Lennell will no longer be residing with the foster parent, and that Boston has been properly assigned by the Department of Education as the LEA of responsibility for Lennell's educational placement. (See Joint Exh. 9) To assert that Boston is not responsible because the student is not yet living at the residential school creates an unresolvable situation and bears no merit. As stipulated, the residential school will not accept Lennell until the LEA of responsibility is established. (Joint Exh. 8) Boston is so designated, and must immediately implement the 502.6 prototype IEP.

III. Boston's right to conduct evaluations and TEAM meetings regarding Lennell's educational needs is to be done in accordance with the regulations. Thus, as would usually occur, Lennell's educational needs must be reevaluated and/or reviewed every year, and yearly IEP's must be developed in accordance with the requirement of the regulations. Boston is unpersuasive in its position that it has the immediate responsibility and the immediate right to conduct its own evaluations to determine Lennell's educational needs. Such argument is akin to the situation where a child moves into the community and Boston would then conduct evaluations pursuant to the "move in" regulation, s. 332.2. However, no such move into Boston is in fact occurring. Instead, Lennell's move is only as a result of a determination that he requires the most restrictive educational setting. That is, the evaluation process has already taken place, and Boston is assigned responsibility for this placement. To label the event as a move in would have allowed for a second round of evaluations and team meetings (see s. 332.2), and would not be in Lennell's best interest to go through this process again, so quickly. Were Lennell actually moving into the Boston community, such evaluation may be in his interest to match his needs to the Boston programs, which allegedly might have led to a less restrictive placement. However, he is not moving into the Boston community, and therefore evaluating for such match is not warranted or authorized in this case. It has already been determined by the TEAM and agreed upon by the Educational Advocate, that Lennell needs a residential educational program; such decision need only be implemented at this

time.

Boston asserts that its inability to contest the 502.6 prototype placement allows for a possible misuse of the system which would go against the interest of Lennell. That is, Milton could write a 502.6 prototype IEP, not because Lennell required it, but because it is a way of Milton's avoiding responsibility for Lennell. Boston is unpersuasive in this argument, for Lennell has an Educational Advocate who is specifically assigned to protect Lennell's interest. She has no conflict of interest through ties with either Boston or Milton. Thus, her decision to sign the IEP is given great weight in assuming that it is in Lennell's best interest that he attend a residential educational program, and that this is the least restrictive setting in which he can be educated. It should be noted here that the Educational Advocate did attend the TEAM meeting, did see the evaluation reports, was aware of her right to obtain an independent evaluation, and was aware of her right to obtain legal representation from the Developmental Disabilities Law Center. (Stipulation #6) She chose to accept the IEP. Given her clear ability to dispute this IEP, her acceptance must be respected. Yet still, observations about this case may be warranted in the interest of assuring that the check and balance be effective. First, it is very important that, as Educational Advocate, she be assigned early in the process so that a) she have as full an understanding of Lennell's needs as possible, and b) she can fully participate in the decision making process. It is further important that the Educational Advocate continue her involvement in Lennell's case, so that, if she believes a less restrictive placement is called for, the appropriate action can be taken. This is particularly important, for this child is moving from an educational program with very little special services to a residential educational program. Such is very unusual, and should be viewed with great caution.

It is noted that, even though there is a check and balance in the system in that Milton's proposed IEP could have been accepted or rejected by the Educational Advocate, there is not a check and balance in the sense that the agency responsible for the 502.6 prototype placement could not contest the placement. Although this is a legitimate concern for the agency, it is a concern that is apparent in many cases where an agency different from the LEA is responsible for the funding - for example, DOE is responsible for 50% of the funding of residential placements, yet it has no say in determining whether such residential educational placement is necessary for the child. It is also a concern, for the agency most likely to raise the question as to whether the residential placement is for education versus other social reasons, has no forum to raise the concern. Thus, for instance, the possibility of Boston's costsharing with another agency, is reduced. However, as long as the Department's regulations do not conflict with the legislature's mandate (M.G.L. c.71B) or with the federal law (20 U.S.C. 1400 et seq.), the Department's regulations must be upheld.

There is nothing in the current situation which suggests any conflict with these laws. That is, Lennell is provided the evaluations, TEAM process, and due process protections, resulting in a decision that he requires a residential educational program in order to maximize his potential in the least restrictive setting.

IV. Milton is not responsible for funding Lennell's 502.6 prototype IEP pursuant to the "move in" regulation, s. 332.3. As discussed above, the change in LEA responsibility from Milton to Boston is not as a result of a move to Boston, but instead is a result of a change in Lennell's educational and living needs for an institutional setting. Boston's involvement is one of LEA assignment of responsibility only. Thus, there is nothing in the Department's regulation which calls for the application of the move in regulation to 202.c and 202.e situations. Further, it should be noted that the Department of Education offers funding for Lennell's placement. (See Joint Exh. 9)

ORDER

Boston shall immediately implement the 502.6 prototype IEP calling for Lennell H.'s placement at the R.F. Kennedy Childrens' Center.

By the Hearing Officer:


Sandra Sherwood

Dated: March 17, 1992

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Gershon R.

BSEA #92-1779

DECISION ON MOTION TO DISMISS

PROCEDURAL HISTORY

On May 8, 1992, Gershon Ross and his mother, through their counsel, Attorney Arthur Golden, requested a BSEA hearing regarding the partially rejected December 11, 1991 IEP promulgated by Framingham Public Schools (hereafter, Framingham). Such IEP called for Gershon's education in a 502.4 prototype 12/'91 - 12/'92 ungraded placement at the Keefe Technical School in Framingham. (See School Exh. 1, Parent's Exh. 1-6)

On May 15, 1992, the BSEA Hearing Officer required Mr. Golden to delineate the issues which his client intended to pursue, specifically stating which issues have arisen since the completion of the BSEA hearing Case #92-0841. Attorney Golden provided such list to Attorney Benjamin and the Hearing Officer on May 22, 1992. (See Attachment A).

On May 19, 1992, Attorney Benjamin, counsel for Framingham, filed a MOTION TO DISMISS, and after receiving the Attorney Golden's list of issues, amended his MOTION. He asserts that res judicata and collateral estoppel preclude any litigation because the subject of the appeal is the December, 1991 - December, 1992 IEP, which was already litigated in a previous BSEA hearing and/or involves the same issues already litigated in a previous BSEA hearing. (See BSEA Decision, #92-0841 issued March 19, 1992). He further asserts that even issues which could have been raised, but were not raised in the previous decision, are precluded from further litigation.

Attorney Golden objected to the MOTION TO DISMISS and supported his claim that res judicata did not preclude litigation of the December, 1991 - December, 1992 IEP. He asserts that the prior hearing was limited by the hearing officer to the 1991 - 1992 school year and that thus, the September - December 1992 portion of the rejected IEP has not yet been litigated. He further asserts that procedural violations resulting from the July 2, 1991 Decision in BSEA Case #91-0229 are not yet litigated. Note, however, that he states on May 22, 1992 that he is not pursuing procedural violations. Finally, on May 26, 1992, Attorney Golden stated that his clients would stipulate that the hearing a) would only concern the program after the end of the 1991 - 1992 school year, (ie.,

1992 summer and September - December, 1992 period), and b) would not include compliance with the March 19, 1992 decision in BSEA Case #92-0841.

RULING

Framingham's MOTION TO DISMISS is granted in part, and denied in part, as follows:

Litigation of the December 1991 - December 1992 IEP, which includes the September - December portion, is precluded by virtue of res judicata and collateral estoppel. The appropriateness of this IEP which called for a placement at Keefe Tech, was fully reviewed in BSEA Case #92-0841. That IEP was developed for a year's period after the three year evaluation, as required by the regulations. The IEP evidences no bifurcated program, but instead one program spanning the December 1991 - December, 1992 period; Mrs. R. had her opportunity to challenge the appropriateness of that program. Although the hearing officer framed the case in terms of the 1991-1992 school year, a reading of the documents submitted in this current case evidence that Ms. Lavoie defined the issue to be litigated in order to distinguish the substantive placement issues from the procedural issues. Nowhere does the framing of the issues evidence an intent to distinguish the 1991 - 1992 school year from the September - December, 1992 issues. This later period is in fact just a continuation of the 1991 - 1992 period already litigated. In fact, Attorney Golden's May 22, 1992 listing of issues to be litigated in the current case reinforces this. Nowhere does he state that the September - December, 1992 portion of the IEP is any different from the December, 1991 - June, 1992 portion of the IEP.

To the extent that Attorney Golden listed actions occurring after the close of the previous hearing, they reflect, with two exceptions discussed below, actions which were, or could have been brought during the pendency of the litigation. Thus, they do not give rise to a new hearing. Although actions occurring after the previous litigation might in some circumstances give rise to a new hearing, the actions listed by Attorney Golden do not do so. Even the independent evaluations which led Framingham to reconvene the TEAM does not give rise to a new hearing, for they could have been obtained earlier in order that they be considered by Ms. Lavoie. They were not. To allow independent evaluations, any TEAM actions resulting from the independent evaluations, any other TEAM actions resulting from issues which could have been brought during the hearing, to trigger due process rights on the IEP already litigated would essentially render the BSEA decisions not final and would be a misuse of the administrative hearing process. Res judicata and collateral estoppel preclude this.

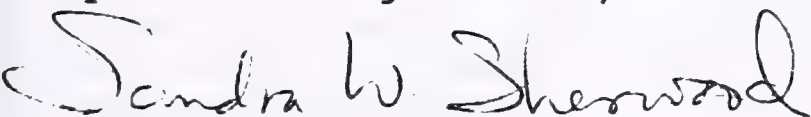
There are two issues which could not have been litigated, and

are not precluded by res judicata or collateral estoppel. To this extent, Framingham's Motion to Dismiss is denied. First, the 1992 summer school placement could not have been litigated. The December, 1991 IEP clearly states that a summer school program could not be fashioned until April, 1992 - long after the close of the litigation. It in fact was not addressed in the hearing. (See School Exh. 1, Parent Exh. 1-6, BSEA Decision #92-0841) Secondly, the asserted denial of a facilitator from January 27 - February 28, 1992 occurred after the January 28, 1992 close of the record, and therefore the asserted right to compensatory services could not have been litigated. Although this issue was addressed by the DOE Complaint Management system, this was not in the context of a due process hearing. Therefore, res judicata does not preclude litigation of either the right to compensatory services, or of the summer school placement. I note, however, that Attorney Golden offered his clients' stipulation on May 26, 1992 that they do not intend to pursue issues of programming prior to June, 1992, and therefore assume that they will not pursue this compensatory issue.

ORDER

Framingham's Motion to Dismiss is granted on all issues regarding the December, 1991 - December 1992 educational placement, except the issue of the 1992 summer placement and the January - February, 1992 compensatory services. A hearing will convene on June 19, 1992 at 9:30 am at the Framingham Public School's Administration Building on the issue of the 1992 summer placement. Both parties are responsible for exchanging documents which are relevant to this summer school placement dispute, and are indexed, starting at #1. Please do not cross reference to previously filed exhibits. Documents and witness lists must be filed with the BSEA and exchanged at least five days prior to the hearing.

By the hearing officer,


Sandra W. Sherwood

Date: June 8, 1992

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

In re: Peter G.

1783
BSEA #92-1003

DECISION ON STONEHAM PUBLIC SCHOOLS' REQUEST FOR A RULING
BARRING PETER G.'S PARENTS FROM INTERFERING WITH ITS RIGHT
TO OBTAIN DISCOVERY AND ITS RIGHT TO PRESENT EXPERT
TESTIMONY AT THE PENDING BSEA HEARING

Peter G. is a 17 year old student, who resides in Stoneham, and attends the Learning Prep School (hereafter, LPS) pursuant to 502.5 prototype IEP's, developed by Stoneham Public Schools (hereafter, Stoneham) since 1988. In May, 1992, Stoneham requested a hearing before the BSEA in order to seek a decision which would find a less restrictive educational placement appropriate for Peter. Until such ruling, Peter remains publicly funded at LPS.

On September 4, 1992, Stoneham filed a REQUEST FOR A RULING in order that Stoneham can obtain the services of an expert consultant in preparing for the BSEA proceeding, to allow the consultant access to information necessary to adequately consult with Stoneham, and to allow the expert to testify at the pending BSEA proceeding scheduled for September 29 and 30, 1992.

On September 9, 1992, the Parents filed their OPPOSITION TO STONEHAM'S REQUEST FOR RULING, arguing that their statutory rights respecting privacy and confidentiality would be violated by allowing an expert consultant access to Peter's records, access to the classroom observations, conversations with the classroom teachers, and access to the BSEA hearing. The Parents further argue that because of the reduced frame time their due process rights would be infringed by limiting their right to discovery of the expert's findings, and their rights to a TEAM meeting to discuss the findings of the consultant and to an independent evaluation would be denied. Finally, the Parents request that if the BSEA rules for Stoneham, the hearing be stayed in order that they can seek a TEAM meeting, independent evaluation, and/or relief under M.G.L. Ch. 214 in Court.

The Parents and Stoneham request oral argument on this matter. Such request is denied, for the briefs submitted by both parties were thorough; oral argument is therefore unnecessary.

RULING

Stoneham has the right to obtain an expert consultant, who has special knowledge or training with respect to the issues of children with special needs, for purposes of advising Stoneham throughout the due process proceedings. This right is established in both federal and state special education regulations which state:

[The parties have] the right to be accompanied by advocates, counsel, and individuals with special knowledge or training with respect to the issues of children with special needs.
603 CMR 28.403.1(a); 34 CFR 300.508(a)(1)

Stoneham's right to retain an expert consultant necessarily includes the right to the consultant's having access to any information discoverable in preparation for the BSEA hearing. As agreed upon by the parties during the prehearing conference, this discovery includes access to the proposed programs, discussions with the proposed teachers, observation of Peter in his classes¹, and his school records. Certainly, an attorney or expert consultant cannot be effective without access to the discoverable information. Absent this access, these persons could not function, and these state and federal regulations would be meaningless.

Finally, this right to retain an expert consultant includes the right to offer into evidence this consultant's testimony, subject to all evidentiary rulings routinely made in BSEA proceedings, repetition, reliability, and notice requirement. This right to offer expert testimony is in keeping with the Administrative Procedures Act, M.G.L. ch. 30A, §10, 11 which calls for a full and fair hearing, and states that each party shall have the right to call and examine witnesses.

Stoneham should be cautioned that the expert may consult and may testify, but may not evaluate Peter without parental consent or further BSEA action. Thus, the expert may review the evaluations in the record and may have an opinion about the evaluations or about the program, based on the evaluations, but may not work with Peter in developing his/her opinion. In sum, he/she may offer opinions about the existing evaluations but may not perform his/her own evaluations. Nor is it likely that Stoneham could obtain permission to conduct an evaluation, as the time for obtaining evaluations or independent evaluations has passed; the burden for proving the need for such evaluation at this time is indeed high.

¹ It is arguable whether the observation of Peter amounts to an evaluation which would be impermissible without consent, and would therefore not be discoverable. However, given the Parents' agreement to such discovery, it is permissible in this case.

Although Peter G. and his parents hold legal protections of confidentiality and privacy, those protections cannot unreasonably limit Stoneham throughout this due process proceeding. To do so would not only tie the hands of the hearing officer in obtaining relevant expert opinion, but would also result in an inequitable proceeding, for the parents could access expert consultants to support their case whereas the school could not. Thus, although the confidentiality and privacy protections are important and must be enforced in the sense that the due process proceedings must be held confidential, Stoneham must have the right to fully prepare for and present its case before the BSEA.

The parents rely on their interpretation of the Massachusetts Special Education statute which, on the surface, gives a rather absolute right against release of records. It states in pertinent part:

The written record and clinical history from both the evaluation provided by the school committee and any independent evaluation, shall be made available to the parents, guardians, or persons with custody of the child. Separate instructions, limited to the information required for adequate care of the child, shall be distributed only to those persons directly concerned with the case of the child. Otherwise said records shall be confidential.
M.G.L. Ch. 71B §3

The parents argue that this absolute right is a higher protection than is afforded under federal laws, and must thereby be incorporated into the Individuals with Disabilities Education Act (IDEA). Town of Burlington v. Department of Education, Commonwealth of Massachusetts, 736 F.2d 773, 789 (1st Cir. 1984).

A closer look at the Massachusetts statute, however, renders the parents' interpretation flawed.

First, this statute does not prohibit the release of records, instead it merely provides that the records must be treated confidentially. Releasing records to persons involved in this due process proceedings is permissible, as those involved in the proceedings are bound by the rule of confidentiality.

This reading of the statute not only reflects the plain meaning of the statute, but it is in keeping with the next paragraph of this law, which states:

The department may hold hearings regarding said evaluations, said hearings to be held in accordance with the provisions of Chapter thirty A. M.G.L. Ch. 71B §3

Even assuming the parents' interpretation of the statute prohibited the general release of records, the prohibition would not apply in

the context of the due process proceedings which are called for in this same statute. Certainly, pursuant to Chapter 30A, attorneys and hearing officers must have access to the evaluations. The due process rights established in Chapter 30A regarding discovery, a full and fair hearing, and the examination of witnesses are clear. Finally, all persons in the due process proceeding are bound by rules of confidentiality.

The parents further rely on Chapter 214 §1B in asserting that they have privacy rights which preclude Stoneham's expert consultant from accessing information about Peter. This statute guarantees their right against unreasonable interference with their privacy. Given the due process rights regarding consultation, discovery, and offering testimony, Stoneham's sharing information with the expert consultant throughout the due process proceeding is not an unreasonable interference; it is, to the contrary, reasonable.

Finally, the parents rely on previous Department of Education opinions which support the confidentiality rights of parents and their children. Such opinions, however, shed no light on the issue at hand, for contrary to the present situation, they do not involve due process proceedings, which are by their nature, confidential. Given the fact that this order is not authorizing an evaluation by the expert consultant, the parents do not have a right to a TEAM meeting or an independent evaluation. Further, given the fact that the parties have already agreed to a time frame for discovery of classroom observations immediately prior to the BSEA hearing, the parties have in essence already waived discovery of any newly obtained information². Any written reports and witness lists must be filed, as usual, at least five days prior to the BSEA hearing, and any testimony can be cross-examined. Thus, a postponement in order to obtain further discovery is not warranted at this time.

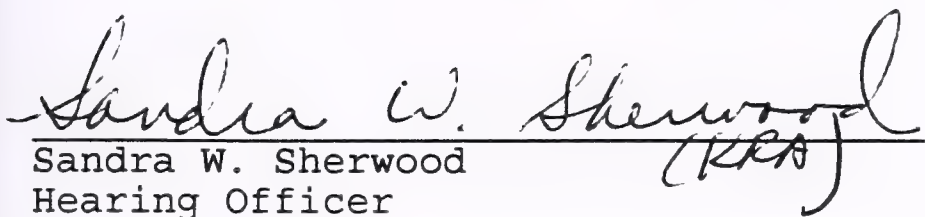
Finally, in view of the need for prompt final resolution in this case, and the fact that the consultant is bound by the same confidentiality obligations as all persons involved in this proceeding, a postponement in order to appeal this decision is not warranted.

The results reached in this decision are consistent with the parents' desire for confidentiality in a manner that best allows for an informed decision in determining the educational placement best able to maximize Peter's development in the least restrictive

² There is no doubt that a hearing officer can order the production of expert witness reports. In that event, fairness would require that it would apply to experts for both sides. Because in this case it was not addressed at the prehearing conference, no such order will apply at this time. Of course, both parties can, by agreement, submit such reports.

setting. Counsel for both parties should be complimented for briefs in this matter. Their lucid coverage of the issues at hand were most helpful.

Signed,


Sandra W. Sherwood
Hearing Officer

Date: September 16, 1992

8/5/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: GREGORY B.

BSEA #92-1877

DECISION

This decision is issued pursuant to M.G.L. c.71B, 30A, and c.15; 20 U.S.C. ss.1401 through 1461; 29 U.S.C. s.794, and the regulations promulgated under those statutes. A hearing was held in the above-entitled matter on June 23, and July 15, 1992, at the Administrative Offices of the Leominster Public Schools in Leominster, MA. In advance of the hearing the parties agreed to bifurcate the issues and to present all the evidence bearing on summer educational services on the June 23rd hearing date. Based on the evidence adduced at that hearing, the hearing officer issued a decision on June 26, 1992, finding that Gregory B. was entitled to receive special education services during the summer, 1992, and ordering his placement at the C.A.S.E. Collaborative during that time. That decision, now labeled AR-1, is incorporated wholly into this subsequent decision on the issue of the appropriate educational placement for Gregory for the 1992-1993 school year. At the hearing on July 15, 1992, Leominster moved to have the Hearing Officer recuse herself, claiming that the prior decision adverse to Leominster's position indicated bias on the part of the Hearing Officer. That motion was denied. The evidence consists of documents submitted by the parents labelled P-1 through P-15, exhibits offered by the school marked S-1 through S-18, and approximately 11 hours of recorded oral testimony. Those in attendance at all or parts of the hearing were:

Gregory B.	-	Student
Mr. and Mrs. B.	-	Parents
Lois Carra	-	Psychologist
Gwendolyn Bertrand	-	Teacher - C.A.S.E. Collaborative
Sharon Powers	-	Teacher - Leominster
Arlene Keoseian	-	Teacher - Leominster
Richard Cocci	-	Special Education Director - Leominster
Louis Aucoin	-	Attorney for Parents
John Habib	-	Student Attorney for Parents
Carol Vittorioso	-	Attorney for Leominster
Lindsay Byrne	-	BSEA Hearing Officer

Both parties submitted written closing arguments by August 3, 1992, and the record closed on that date.

44-210

ISSUE

Whether the 1992-1993 Individual Education Plan proposed by Leominster is reasonably calculated to provide the maximum feasible educational benefit to Gregory B. in the least restrictive setting?

PARENTS' POSITION

The proposed IEP fails to provide some services identified by Gregory's former teacher and independent evaluator as critical to his continued educational growth. The IEP lacks a comprehensive behavioral program which is necessary to provide the framework and structure for all of Gregory's learning. Furthermore, due to funding priorities, implementation of the community experience component of the proposed plan is uncertain.

SCHOOL'S POSITION

The proposed placement at Leominster Technical High School provides the type of experiential, hands-on, prevocational program recommended for Gregory in a regular high school environment within Gregory's home community. Funding has been committed to provide adjunct community experiences. The proposed plan is the least restrictive, appropriate placement for Gregory at this time.

SUMMARY OF THE EVIDENCE

The pertinent facts are not in dispute. Most have been discussed in the prior decision (AR-1) and that discussion is incorporated herein.

1. Gregory is a fourteen year old, who has received special education services in substantially separate programs since he was three years old. Gregory is moderately developmentally delayed in all areas. He has particular weaknesses in language and communication skills, and fine motor skills. Academically, his skills range from the kindergarten through the second grade level. Gregory has also been diagnosed with Attention Deficit Disorder. He exhibits difficult behaviors such as noncompliance, paper-rattling, chewing inedible objects, and scratching/picking himself, that interfere with learning. Gregory's difficult behaviors, particularly his noncompliance, are the chief impediments to his educational growth. (Powers, Carra, Mrs. B., P-1, P-2, P-15; S-1, S-3-S-7.)

2. Gregory requires comprehensive behavioral programming to address and remediate his interfering behaviors. Such a program would include a token reinforcement program for target behaviors, concrete environmental reinforcers and reminders, increased use

of intensive small group and individual instruction, and curriculum content that is more desirable to Gregory (than a strictly academic approach, for example). (S-4, S-5, S-6; Carra.) Only when Gregory's interfering behaviors are under control can he express and build upon his previously learned skills.

(Powers, Carra) The focus of Gregory's learning should be on acquisition of communication and prevocational skills. To that end the curriculum should stress functional academics, such as life skills, reading and use of money and time computation. There should be direct instruction in social skills and communication skills, which is reinforced in all settings. The related services of occupational and speech therapy should be integrated into the classroom, so that the targeted students can generalize the techniques and the teachers can reinforce remediation strategies. Also prevocational instruction must be available in the classroom with opportunities to practice and generalize the newly-learned skills in the mainstream. (Carra, Powers; S-4, S-5, S-6; P-15)

3. Arlene Keoseian, in her fifth year as Prevocational Instructor at Leominster Technical High School, described the program contemplated for Gregory under the 1992-1993, 502.4 IEP proposed by Leominster. The self-contained classroom is located in a small high school, the purpose of which is to provide all students with vocational training. There are ten students, including Gregory, slated for the classroom in 1992-1993. Ms. Keoseian has a full-time assistant in the class. (S-18) The students range in age from 14 to 19. Their academic skills range from pre-school to 3rd grade. The classroom instruction focuses on functional academics and activities of daily living skills. There is a prevocational component in the class, which uses standard, commercially available, packages for instruction in small parts assembly, mail sorting, packaging, etc. In addition, because of the proximity of vocational offerings for mainstream students, some students in Ms. Keoseian's class are able to participate in regular shop classes with additional supervision. During 1991-1992, one student participated in a culinary arts program and another explored the plant maintenance shop. After extensive vocational testing, older students are able to participate in Project Vantage, which pairs a student with a job coach at a community-based work site. The prevocational class expects to participate as a group in community experiences one period per week for reinforcement of functional skills. Although lack of funds permitted only three or four such community outings during 1991-92, more regular experiences are expected during the 1992-93 school year. (See also testimony of Cocci) Within the high school setting, the prevocational students are mainstreamed for lunch and assemblies. Other mainstream contact is highly individualized. Related services of occupational therapy, speech therapy and physical therapy are available to individual students, as needed. All related services are delivered outside the classroom. Gregory is scheduled to receive one "pull-out"

speech therapy session per week. (Keoseian, P-4)

A typical daily format for the prevocational class would include: fundamental academic instruction to start the day, then gym or other large motor activities. After gym the class plays games, which promote and reinforce appropriate work behavior. An arts and crafts project then develops fine motor skills. There is a forty minute lunch period after which the afternoon is devoted to prevocational activities. Ms. Keoseian testified that none of the students have individual behavior plans, and that there is no group behavior management plan in effect for her class. Mr. Cocci, Director of Special Education, confirmed that the prevocational class proposed for Gregory has no formal behavioral component. (Keoseian, Cocci; S-11)

Dr. Carra visited the proposed class at Leominster Technical High School in April, 1992. (See AR-1) She testified that while the program was a good one, it was not appropriate for Gregory, because it lacked a formal behavioral approach and failed to focus on the development of communication skills. Further, the program did not offer either an integrated therapeutic approach or formal social skills instruction, both of which are necessary elements of an appropriate educational program for Gregory.

4. Gwendolyn Bertrand, the teacher in the C.A.S.E. Collaborative class in which the parents request Gregory's placement, described the program there. (See also, AR-1, p. 3.) For the 1992-1993 school year, five students are expected to attend the program. They range in age from thirteen to fifteen. All are developmentally disabled and all have behavioral and social difficulties to some degree. Three students have additional diagnoses of attention deficit disorder. Their functional academic skills range from kindergarten to second grade. Aside from the head teacher (due to parental leave Ms. Bertrand will not be the head teacher in the fall, 1992), there are two full-time instructional assistants and one full-time sign-language interpreter in the classroom. The speech and occupational therapists are present in the classroom about half the time, delivering individual and group services, training teachers, and ensuring the integration and generalization of their recommendations. A physical therapist is also in the classroom about one quarter of the time. A consulting psychologist conducts a formal social skills group twice per week in the classroom, as well as providing individual student counseling, consultation on behavior management, and teacher training. Each student, upon entry, has a baseline behavioral analysis, which results in an individualized behavior plan that is then implemented across settings. In addition, the classroom itself has a behavior program in place. The students contribute to the development of the classroom rules and generally select activity reinforcers for positive adherence. A behavioral specialist is on-call for unusual events, though no consultations

were necessary in 1991-1992.

The C.A.S.E program is designed to prepare students for vocational training. Classroom instruction focuses on functional academics (math, money, time, reading, computer skills, health and hygiene), social skills and prevocational activities. Prevocational training has several components: work behavior and attitudes; simulated training programs such as small parts assembly, mail sorting and food preparation; and work experiences outside the classroom, such as table washing, paper recycling, can crushing, etc. The classroom is located in a middle school housing regular 6th to 8th grades. Ms. Bertrand testified that there is schoolwide support for integration of C.A.S.E. students in the regular activities of the school. As a result, each C.A.S.E. student has a regular homeroom. As they are able, C.A.S.E. students participate in regular home economics, woodshop, music, and library classes. They attend assemblies and field trips. And they eat lunch daily in the mainstream. The activities are always supervised by a C.A.S.E. staff member who assists the student in practicing social and functional skills and ensures cross-setting implementation of the student's individual behavioral plan.

The school day runs from 8:20 a.m. to 2:25 p.m. Generally the structured academic/therapeutic activities take place in the morning while prevocational instruction occupies the afternoon. One morning a week the class swims, and one afternoon a week the class goes to various locations in the community to practice social and functional skills. For example, a trip to a grocery store would address making lists, using money, functional reading, counting and sorting, appropriate community behavior, and safety awareness. (Bertrand; P-5, P-9-13; S-12)

Ms. Bertran evaluated Gregory in the spring, 1992, for possible entry into the C.A.S.E. program, and found that he was an appropriate candidate. Dr. Carra visited the C.A.S.E. program in June, 1992, and found that it had all the elements of an appropriately tailored program for Gregory. She testified that she was particularly impressed with the behavioral component of the C.A.S.E. classroom and the training of the teachers in effective behavioral interventions. (Bertrand; Carra)

FINDINGS AND CONCLUSIONS

There is no dispute that Gregory B. is a student with special learning needs as defined by M.G.L. ch. 71B and 20 U.S.C. 1401 et seq., and therefore that he is entitled to receive a free, appropriate public education. At issue is whether the

special education program proposed by Leominster is appropriately tailored to meet Gregory's unique learning needs. After careful consideration of all the evidence presented in this matter, and of the arguments made by the representatives of the parties, I find that it is not. The preponderance of the evidence supports Gregory's placement in the program advocated by the parents: C.A.S.E., for the 1992-1993 school year.

The chief reason for this conclusion is the admitted lack of behavioral programming at the Leominster Technical High School. (Keoseian, Cocci.) Every expert who has evaluated Gregory over the years has identified Gregory's behavior as the primary impediment to learning skills commensurate with his cognitive profile. (See S-1, S-3, S-4, S-5, S-6, S-7, P-1, P-2, P-15; Carra.) Yet, historically Leominster has not developed effective behavioral management services in its programs for Gregory. (Mrs. B., Cocci) Ms. Powers, Gregory's 1991-1992 teacher, testified eloquently about Gregory's needs for an educational program focusing on behavioral and prevocational skills. I found Ms. Powers to be an exceptionally credible and persuasive witness, and therefore, give her recommendations great weight. Yet, despite the acknowledged need for a comprehensive behavioral approach to Gregory's education, no behavioral component exists in the placement proposed for him for next year. (Keoseian, Cocci, Carra) Therefore, it is simply inadequate.

The only program about which there was evidence introduced at the hearing that offered all the elements identified by Gregory's evaluators and teachers as necessary to an appropriately tailored education for him: a behavior management component, prevocational and social skills instruction, integrated therapies, and regular community experiences, was the C.A.S.E. Collaborative.

Without effective behavioral programming, the Leominster Technical High School placement, despite its other strengths, does not reflect the service recommendations developed for Gregory by the TEAM. An IEP that fails to address all of a student's educational needs, as identified by the TEAM, cannot meet the federal and state standards for provision of special education services. Absent an individually tailored behavioral component and a stronger emphasis on integrated communication skills, the IEP proposed by Leominster cannot be said to be reasonably calculated to provide the maximum feasible educational benefit to Gregory in the least restrictive setting.

ORDER

Leominster is hereby ordered to develop an IEP for Gregory B. calling for his placement at the C.A.S.E. Collaborative for the 1992-1993 school year.

By the Hearing Officer,

Lindsay Byrne
Lindsay Byrne (KRB)

Dated: August 5, 1992

7/17/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: GREGORY B.

BSEA #92-1877

INTERIM DECISION

This matter comes before the Bureau of Special Education Appeals pursuant to M.G.L. c.71B, 15 and 30A, 20 U.S.C. 1401 through 1461, 29 U.S.C. 794, and the Regulations promulgated under those statutes. In advance of the hearing the parties agreed that two separable issues would be presented for decision: 1) Whether Gregory requires educational services over the summer?, and 2) whether the 1992-1993 IEP developed by Leominster is reasonably calculated to provide the maximum feasible benefit to Gregory in the least restrictive setting? Although the evidence pertinent to the two issues overlaps, the parties agreed that all evidence bearing on a summer program would be presented on the first day of hearing, June 23, 1992. Additional evidence concerning the proposed placements for the 1992-1993 school year will be presented on the second day of hearing, scheduled for July 15, 1992. In this way, a decision on summer services could be reached before the program requested by the parents began on June 30, 1992. The parties were notified of the parameters of the Decision by a telephone order to their respective representatives on June 26, 1992. Those in attendance at the hearing on June 23, 1992, were:

Gregory B.	- Student
Mr. and Mrs. B.	- Parents
Lois Carra	- Psychologist
Gwendolyn Bertrand	- Teacher - C.A.S.E. Collaborative
Sharon Powers	- Teacher - Leominster
Richard Cocci	- Special Education Director - Leominster
Louis Aucoin	- Attorney for Parents
John Habib	- Student Attorney for Parents
Carol Vittorioso	- Attorney for School
Lindsay Byrne	- Hearing Officer, BSEA

The evidence consists of documents submitted by the parents labelled P-1 through P-6 and P-8 through P-15, school exhibits marked S-1 through S-12, and approximately 6 hours of recorded oral testimony. Both parties made oral arguments on the evidence and legal standards concerning summer services for special education students, in the June 23, 1992, hearing.

44-217

SUMMARY OF THE EVIDENCE

For the purpose of resolving the issue of whether Gregory is entitled to receive summer educational services through the Leominster Public Schools, the evidence may be briefly summarized.

1. Gregory is a 14 year old who has received special education services in substantially separate programs since the age of three. Gregory is moderately developmentally delayed in all areas. He has particular weaknesses in language and communication skills, and fine motor skills. Gregory also has Attention Deficit Disorder. He exhibits difficult behaviors such as noncompliance, paper-rattling, chewing on inedible objects, and scratching, that interfere with his learning. (Powers, Carra, Mrs. B.; P-1, 2, 15; S-1, 3, 4, 5, 6, 7.)

2. During the 1991-1992 school year, Gregory attended a substantially separate program at the Northwest School in Leominster taught by Sharon Powers. (P-3, 8) Ms. Powers testified that the program focused on developmental academics. She also testified that Gregory needed a prevocational/life skills approach that was not available in her classroom. Although a prevocational component, consisting of shadowing the building's custodian and re-shelving library books without supervision, was added to Gregory's program in December, 1991, it was implemented inconsistently. The primary factor interfering with Gregory's progress was his inappropriate behavior. Although Ms. Powers did not implement a formal behavior management plan, Gregory's behavioral skills did improve through the course of the year. This improvement permitted Ms. Powers to assess Gregory's academic progress. She testified that Gregory made minimal, if any, progress in developmental academic skills through the course of the school year, though he was able to retain what he had learned in previous placements. Ms. Powers stated that Gregory did not need a summer placement to maintain his academic skills, but that he would benefit from a program designed to address his behavioral needs. Such a placement might prevent the "out-of-control" behavior she witnessed in the fall, 1991, thus permitting Gregory to focus appropriately on learning. (Powers; S-7, S-4)

3. Dr. Lois Carra conducted an independent evaluation of Gregory in November and December, 1991. (P-1, 2) In addition she visited Gregory's then current placement in Ms. Powers' class, the placement proposed by Leominster for 1992-1993 at Leominster Technical High School, and the program requested by the parent at the C.A.S.E. Collaborative. Based on her own testing as well as a review of the student's records and anecdotes related at TEAM meetings, Dr. Carra recommended that Gregory receive educational services in the summer. She testified that summer services would prevent behavioral regression that interferes both with learning

new material and expressing retained information. Dr. Carra pointed to Gregory's behavior in the fall, 1991, as evidence of regression after a summer without educational services and structure. Dr. Carra recommended that Gregory attend the summer component at the C.A.S.E. Collaborative. The C.A.S.E. program contains all the elements of appropriate educational programming recommended for Gregory. (See P-1, 2) Placement at C.A.S.E. would prevent Gregory from falling back into his pattern of maladaptive behaviors and would provide the routine and services he needs to maintain appropriate behaviors and practice social and communication skills. (Carra)

4. Leominster does not offer summer educational services to its special education students. They may attend a playground group run by the Recreation Department. (Cocci)

5. The C.A.S.E. Collaborative summer program is an extension of the full year program with additional recreational activities. Gwendolyn Bertrand, the teacher for the classroom into which Gregory would be most appropriately placed, described the summer program. There would be five students in the class between 13 and 15 years old. All are developmentally delayed, with functional academic skills ranging between the kindergarten and the second grade level. There are one teacher, one aide, and one sign language interpreter assigned full time to the classroom. In addition a speech/language pathologist and an occupational therapist are in the classroom approximately half the time, and a physical therapist is in the classroom about four hours per week. All students have individual behavior management plans which are implemented across settings, and the classroom has clear rules and consequences which the students help develop. Since the summer program continues the school year program, the students follow a functional academic/life skills/prevocational skills curriculum. There is direct instruction in social skills and daily living skills such as hygiene, grooming, friendly reciprocal language, etc. The class goes on community trips at least once a week and in the summer does a lot of cooking. All related services are integrated into the classroom program. (Bertrand)

Ms. Bertrand evaluated Gregory for possible entrance into the C.A.S.E. program in April, 1992. She found that he could be appropriately served in her classroom.

FINDINGS AND CONCLUSIONS

After careful consideration of all the evidence presented on the issue of summer programming for Gregory, and of the arguments

of both parties' representatives, it is my determination that Gregory B. is entitled to receive educational services through the Leominster Public Schools during the summer, 1992. The preponderance of the credible evidence indicates that it is likely that Gregory's behavioral skills will regress if he is not afforded the opportunity for reinforcement and practice over the summer.

(Powers, Carra) Poor behavioral control was the chief factor interfering with Gregory's learning process in the fall, 1991.

(Powers) Such an experience should not be repeated. The C.A.S.E. Collaborative offers a summer program with the type of behaviorally oriented life skills/prevocational curriculum recommended by Gregory's evaluators and teachers. (Bertrand, Carra, Powers; Compare P-1, 2, S-3, 4: S-7; P-5.) No educational programming is available during the summer directly from the Leominster Public Schools. Therefore, in order to meet Gregory's demonstrated need for summer services, immediate placement in the C.A.S.E. Collaborative summer component, the only program about which there was evidence at the hearing, is warranted.

In addition to a finding that summer programming is necessary to prevent substantial regression in Gregory's behavioral skills, the evidence also supports the conclusion that Gregory is entitled to compensatory educational services. Despite the inclusion of a "prevocational program" on Gregory's IEP (P-3), a service the TEAM agreed was a critical element of Gregory's overall educational program, prevocational skills were not seriously addressed during the course of the 1991-1992 school year. While Ms. Powers did work on antecedent behavioral skills in the classroom, she stressed that her focus was the development of academic skills. The bulk of the prevocational "program" designed for Gregory consisted of shadowing the building custodian, an activity which took place only intermittently at best and was discontinued without notice to the parents at the custodian's request, and of shelving books in the school library without instruction or supervision. Neither of these activities conform to accepted educational practices concerning prevocational instruction. The failure of a school district to deliver necessary, and promised, special education services to the detriment of a student raises the possibility of compensatory services. In this case I find that the parties are in agreement that Gregory needed prevocational instruction during the 1991-1992 school year, that he failed to receive appropriate instruction, and that appropriate instruction is available to him this summer through the C.A.S.E. Collaborative. Attendance at C.A.S.E. this summer would serve to ameliorate the harm caused by Leominster's failure to deliver an appropriately comprehensive educational program to Gregory during the 1991-1992 school year.

ORDER

Gregory B. is entitled to summer, 1992, educational programming through the Leominster Public Schools both as a compensatory service and because an appropriately designed and delivered program will serve to prevent the substantial regression in behavioral skills that is likely to occur without such services. 603. CMR 322.18.

By the Hearing Officer

Lindsay Byrne
Lindsay Byrne

Dated July 1st 1992

9/16/92

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN: RE: STEVEN G.

BSEA #92-2309

DECISION

This decision is rendered pursuant to M.G.L. Chapters 15, 30A and 71B; 20 U.S.C. §1401 et seq.; 29 U.S.C. §794; and all of the regulations promulgated under each of these statutes.

A hearing in the above-entitled matter was held on July 24 and July 30, 1992 at the Massachusetts Department of Education in Quincy, MA.

Those in attendance were:

Yanick G.	Parent
Clark G.	Parent
Arthur Odum	Advisor
Homer Reed	Psychologist, New England Medical Center
Ellette DiPietro	Coordinator of Social Services, May Center
Nyemade Washington	Teacher/Case Manager, May Center
Mary Ann Byrnes	Director of Pupil Services and Special Education, Sudbury Public Schools
Corey Merriman	School Psychologist, Sudbury
Regina Tate	Attorney for Sudbury
Raymond Oliver	Hearing Officer, Bureau of Special Education Appeals

The evidence consisted of Parents' Exhibits labelled P-1 through P-19 omitting P-12; Sudbury Public Schools' Exhibits labelled S-1 through S-14 omitting S-12 and S-13; and approximately 8 3/4 hours of oral testimony. Parents represented themselves and acted as advocates at this hearing. They were offered the opportunity to testify as Steven's parents but declined to do so.

STATEMENT/CHRONOLOGY OF THE CASE

Steven G. and his family reside in Sudbury, MA. Steven is a 6 year old boy currently attending the May Center for Early Childhood Education (May) in Arlington, MA. Steven has been a student at May for almost 2 years, first under a home component for several months and then, up to the present time including summers, Steven has attended May's integrated pre-school program under a 502.8 prototype individual education plan (IEP). These

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May programs have been funded by Sudbury Public Schools (Sudbury). (See P-15; S-11, 14).

On March 11, 1992, Parents attended a general May workshop on transitioning pre-school students back into public schools, meeting with other parents who had already transitioned students and those in the process of doing so. Parents then informed May that they wished to transition Steven back to Sudbury. On April 15, 1992, May and Parents held a meeting specifically to discuss options for Steven leaving May, transition issues, and a possible transition for Steven. Sudbury was not invited to this meeting. (See testimony, DiPietro.) May transition coordinator, Ms. DiPietro, testified that she informed Parents that with the transition beginning so late in the school year it was possible that Sudbury would not be able to transition Steven for September and that they look to later in the school year which was all right with Parents if the parties aimed for September. Ms. DiPietro testified that typically the process to transition a child for September starts in January, February or even earlier; that May tries to have a least a 6 month planning period; that May has not transitioned a child in September when notification to the receiving school had gone out this late in the school year; but that an April notification was not late for a mid year transition i.e. January 1993. Ms. DiPietro testified that Steven was a little more difficult to transition than some May students because he needs a greater level of services and that May had made a staff decision to wait a little longer with Steven and had initiated transition discussions later than May normally does. Ms. DiPietro contacted Ms. Merriman, Sudbury school psychologist and out-of-district liaison, the last week of April 1992 regarding a possible transition for Steven to Sudbury in September. This was the first time Sudbury was made aware that Parents wished for Steven to transition back to Sudbury. (See testimony, DiPietro; Merriman).

Sudbury's initial reaction was that it could not handle Steven's transition for September and would prefer to do it later in the school year, which was fine with Ms. DiPietro who expected it. (See testimony, DiPietro; Merriman). Several days later Dr. Byrnes, Sudbury Director of Special Education, called Ms. DiPietro and informed her that Sudbury was developing a new program for September that might be appropriate for Steven and that the transition might be able to be done in September. Dates of May 20, 1992 for a transition meeting, and June 11, 1992 for an IEP meeting were confirmed at this time. (See testimony, DiPietro; Byrnes). On May 18, 1992, Ms. DiPietro and Ms. Washington, one of Steven's teachers at May, met Dr. Byrnes and visited Sudbury for several hours. They viewed the then existing integrated pre-school program to observe several special education students who would be classmates of Steven in the new integrated kindergarten program proposed for September, if Steven were to be transitioned to Sudbury. They also discussed the

different ways other school systems had transitioned students from May. Options discussed included the school system's sending an aide to May to be trained for 3-6 weeks during the summer; having a person hired and trained by May during the summer and then moving with the transitioned child to the receiving school system; or in situations where the school system feels its aides are already appropriately trained/experienced, having the aide come to May near the end of the summer to observe the child, spend time in the classroom, get to know the child and effect a smooth transition. (See testimony, Byrnes.) Dr. Byrnes testified that she informed Ms. DiPietro at this May 18, 1992 meeting that Sudbury would utilize the third option because its aides were already trained and experienced in behavioral issues, language issues and developmental delay issues and any further training would be provided by Sudbury on site. Dr. Byrnes also noted that Sudbury utilized many strategies and techniques employed at May. (See also testimony of Washington). Dr. Byrnes testified that she told Ms. DiPietro on May 18 that Sudbury would not agree to provide an aide to be trained for 3-6 weeks at May.

On May 20, 1992, Ms. Merriman and Ms. Brant, Sudbury speech and language pathologist, observed Steven at May for about one hour to observe his May program and his functioning level. Later on May 20, 1992, Ms. Merriman and Ms. Brant along with Mrs. G., Ms. DiPietro, Ms. Washington and several other May personnel participated in a transition planning meeting for Steven, which focused upon the level of support services Steven would require within Sudbury's kindergarten program, including an aide. The three options discussed in the preceding paragraph were again discussed in the mode of information sharing. Ms. Merriman stated that Sudbury already had qualified aides who could appropriately deal with Steven within the proposed kindergarten classroom. Discussion also focused upon May writing a summer amendment to extend Steven's current IEP and Sudbury preparing a new IEP for the new school year; writing a new IEP for July 1992 to June 1993 with May providing the 1992 summer piece, and Sudbury, with May's assistance, developing the school year piece; and Parents' desire for more than a full year IEP also to include the subsequent (1993) summer. Regarding Parents' request for 1993 summer programming Ms. Merriman stated that Sudbury could not commit to a program that far into the future, but that a statement could be written into the IEP that the team would reconvene in January 1993 to discuss summer planning for 1993. Parties scheduled a further meeting for June 3, 1992 and reaffirmed the scheduling of the June 11, 1992 meeting. (See testimony, DiPietro; Merriman).

On June 3, 1992, Ms. Washington visited the then existing Sudbury kindergarten for about 1 hour and then met with Ms. Brant for 1½ hours to share information about Steven and to develop an IEP from September 1992 onward at Sudbury. Ms. Washington spoke at length about Steven, how he learned, his skill levels,

progress made/objectives achieved, what Steven continued to require, and suggestions for Sudbury's IEP. Ms. Brant was very receptive, wrote down Ms. Washington's information, and stated that she would develop Steven's IEP from Ms. Washington's information, ideas and suggestions until Sudbury was able to observe and evaluate Steven within his Sudbury program. (See testimony, Ms. Washington; P-8; also testimony of Ms. DiPietro; Dr. Byrnes; Ms. Merriman.)

On June 8, 1992, Ms. Merriman called Ms. DiPietro to inform her that, because of other commitments, she would be unable to attend the IEP meeting on June 11, 1992 and that such meeting only involved a summer amendment anyway. Ms. DiPietro told Ms. Merriman that it was important for Sudbury to have someone at the meeting but if no one from Sudbury could attend, May could present at least the summer portion of the IEP but would still need to have the transition information, because that was the other major portion of what the meeting was supposed to be accomplishing. (See testimony, DiPietro). Ms. Merriman testified that she never understood that the IEP meeting on June 11, 1992 was to develop a full IEP, because you cannot develop a full year IEP with two different prototypes at two different placements; that it was her understanding that the June 11, 1992 meeting was only to develop a summer amendment to Steven's IEP; and that Sudbury was working on a transitional IEP that would be finished shortly. On June 9, 1992 Ms. Merriman telephoned Mrs. G. to inform her that she would not be attending the June 11, 1992 meeting; that Sudbury was preparing its new IEP for Steven as developed by Ms. Washington and Ms. Brant and was close to finalizing it; and discussed issues regarding Steven's transition, possible regression, and the ways Sudbury would utilize an aide to deal with these issues. Ms. Merriman testified that she informed Mrs. G. that Sudbury would not have an aide trained for 3-6 weeks at May; that the Sudbury aide would visit/observe Steven for a day or two at May in late August; and that the Sudbury aide already had the training and experience to appropriately serve Steven. Mrs. G. felt that the aide should be trained by May. (See testimony, Merriman).

On June 9, 1992, Mrs. G. sent a letter to Ms. DiPietro with a copy sent to Ms. Merriman, received by Sudbury on June 12, 1992. In this letter (P-5; S-8) Mrs. G. expressed: 1) her concerns that without Sudbury present she did not consider the June 11, 1992 meeting to be an IEP meeting; 2) her concerns regarding Steven's transition, possible regression, and her understanding that "all agreed" at the May 20, 1992 meeting that Steven should have an aide trained for 6 weeks at May; 3) that Parents had had Steven evaluated at the New England Medical Center with the results indicating that Steven was still at a critical level; and 4) that Steven required 5 days of full-time program (per week) for 12 months a year, a May trained aide trained for 6 weeks prior to Steven's transition in September,

the same aide to continue to assist Steven in his Sudbury kindergarten classroom, and all of these services to be incorporated into Steven's IEP in order for Parents to proceed with it. Ms. Merriman testified that Mrs. G. had not informed her of any evaluation Parents had had performed during their June 9, 1992 telephone conversation. (Testimony, Merriman).

On June 11, 1992, the IEP meeting took place with Parents and May personnel present but without any representative from Sudbury. Except for page 3A, the IEP had been prepared by May prior to the June 11, 1992 meeting. (See testimony, DiPietro). This IEP (See P-2, 2a, 3; S-7) covered 6/30/92 to 8/31/92 and continued Steven's placement at May during that period. The meeting participants discussed the situation and it was decided to send May's transition recommendations along with the IEP, which were typed up and inserted as page 3A of the IEP. The recommendations included a 1:1 aide and the possibility of 3-6 weeks of May training. (See P-3; testimony, DiPietro). It was explained to Parents that page 3A of the proposed IEP were only May's recommendations that could be rejected by Sudbury; that Sudbury might not agree with these recommendations and they may not be included since this was only a proposal; and that this amendment had to have Sudbury's approval, since it technically was Sudbury's IEP. (See testimony, DiPietro). Ms. DiPietro testified that prior to the June 11, 1992 IEP meeting Parents had not told May anything about their independent evaluation, so this IEP was not written based upon the New England Medical Center (NEMC) evaluation; that Parents did not bring the NEMC evaluation to the June 11, 1992 IEP meeting; that she requested that Parents send May and Sudbury a copy of the NEMC evaluation; and that May first received a copy of the evaluation 1-2 weeks after the IEP meeting.

Parents hand delivered the June 11, 1992 IEP to Sudbury on June 11, 1992 and it was seen by Sudbury on that date. Dr. Byrnes attempted to contact Ms. DiPietro. Contact was made on June 12, 1992 by which time Dr. Byrnes had first seen Mrs. G.'s June 9, 1992 letter to Ms. DiPietro/Ms. Merriman (P-5; S-8). Dr. Byrnes expressed her surprise at the level of aide and transition services May was recommending and her shock at the existence of a new evaluation (still unseen by either May or Sudbury), plus Mrs. G.'s statements of Steven being at a critical level which was a totally new factor to consider. Because of these new events, Dr. Byrnes questioned whether Sudbury could adequately service Steven and if he should remain at May. Ms. DiPietro explained to Dr. Byrnes what May meant by a 1:1 aide and its other recommendations made on page 3A. Dr. Byrnes and Ms. DiPietro decided that the best course of action to follow was to convene a team meeting when all of the team members (Sudbury and May and Parents) were available to go over the NEMC evaluation; and that the amendment to the IEP be extended to allow the team to review the evaluation and meet. Ms. DiPietro suggested that the IEP be

extended until the end of September. Dr. Byrnes felt that would not allow enough team and transition planning time or IEP writing time. Dr. Byrnes suggested extension of the IEP to the end of October which would also allow Parents and May staff to visit the actual Sudbury program and see the teacher, aides and students in operation. Ms. DiPietro was comfortable with this. Dr. Byrnes and Ms. DiPietro also agreed to change pages 3 and 3A of the IEP amendment. Dr. Byrnes added language to Page 3; May faxed Sudbury a blank page 3A which was inserted into the IEP; and the original page 3A with May's transition recommendations was deleted. Dr. Byrnes asked Ms. DiPietro to contact Parents about these changes and she agreed to do so. Both agreed to send the other a copy of the NEMC evaluation when either of them received it. (See testimony, Byrnes; DiPietro; P-2, 2a, 3; S-7). Ms. Merriman contacted Ms. Brant to halt work on Steven's transition IEP to Sudbury until further information from the NEMC evaluation was available, reviewed, and a team meeting had taken place. (Testimony, Merriman). In fact, the draft IEP for Steven's transition from May to Sudbury (S-10) was not seen by Dr. Byrnes until the day before the first day of hearing and by Parents until the first day of hearing. (See testimony, Byrnes).

On June 12, 1992, Dr. Byrnes sent a letter to Mrs. G. delineating her receipt of the June 11 IEP; her receipt of Mrs. G.'s June 9, 1992 letter indicating the existence of a NEMC evaluation, Steven's critical level, and Sudbury's lack of receipt of this new evaluation; Dr. Byrnes' conversation with Ms. DiPietro; and the changes that Dr. Byrnes was making in the IEP including extension of the IEP to October 30, 1992 so that this new information could be considered by the team. (See P-9; S-6). On June 18, 1992, Ms. DiPietro also wrote to Mrs. G. regarding these issues. (See P-7).

On June 18, 1992, Mr. and Mrs. G. wrote a letter to Dr. Byrnes which enclosed a copy of Steven's evaluation from NEMC; admitted that the NEMC evaluation did not actually state that Steven was at a critical level but Parents had chosen to use that word; accused Sudbury of attempting to delay the transition process; emphasized Parents' position that it was critical for Steven to make the transition to Sudbury as soon as possible; and disagreed with Sudbury's extension of the IEP's time period from 8/30/92 to 10/30/92 as well as the deletion of page 3A, rejecting these portions of the IEP. This letter was received by Sudbury on June 23, 1992. (See P-10, S-5). On June 29, 1992, Dr. Byrnes wrote a letter to Mr. and Mrs. G. (P-11; S-3) in response to Mrs. G.'s June 18, 1992 letter. Dr. Byrnes letter noted:

The staff of the Sudbury Schools spent considerable time in meetings and communications with staff from the May Institute after you notified May that you would like a transition to Sudbury for September. We were prepared to offer you an IEP which had been developed

in collaboration with the May staff. Then, as you note, you announced there existed a new evaluation which contained information which was directly relevant to Steven's programming.

Both the regulations and professional standards dictate that any program should be designed with full knowledge of diagnostic information. This report, which arrived along with your June 23 letter, (date June 18 letter arrived) was not available to either Sudbury or May staff at the time the IEP was written. Indeed, as you indicate, you had informed no one that you were having this evaluation completed. Based upon your announcement, the currently offered IEP was written.

On June 30, 1992 BSEA received Mr. & Mrs. G's request for a hearing. (See P-16).

ISSUES

I. Are the June 11, 1992 IEP meeting, the IEP which resulted from the June 11, 1992 IEP meeting, or any subsequent changes made by Sudbury to the IEP which resulted from the June 11, 1992 IEP meeting valid?

II. Should Steven be transitioned to Sudbury during the 1992-93 school year? If so, when is the most appropriate time to transition Steven from May to Sudbury? What level of aide transitional services are required?

PROFILE OF STUDENT

Steven is a 6 year old boy with a diagnosis of pervasive developmental disorder/childhood autism or at least many autistic tendencies. He has been evaluated twice at the New England Medical Center by Neuropsychologist Dr. Homer Reed, first in October 1990 when he was 4 years 4 months old (P-19) prior to his placement at May and then again in May 1992 at age 6 (P-1; S-9) after approximately 1½ years at May. Steven achieved the following results:

<u>Test Instrument</u>	<u>10/90-4y 4m</u>	<u>5/92-6y 0m</u>
Leiter International Performance Scale - Non Language Based	Mental Age 4y 6m	Mental Age 5y 10m
Stanford Binet Intelligence Scale-Language Based	Untestable	Mental Age 3y 6m

Peabody Picture Vocabulary Test-
Revised

Mental Age
2y 4m

Vineland Social Maturity
Scale

Age Equivalent
2.5

Age Equivalent
5.5

Beery-Buktenica Developmental
Test of Visual Motor Integration

Age Equivalent
5y 7m

Although Steven continues to exhibit many autistic tendencies, Dr. Reed found Steven to have made remarkable progress and improvement in socialization and self help skills during the last 1½ years. Steven has continued to demonstrate normal intellectual potential without language/on language free tasks as demonstrated on the Leiter. Although Steven's score on the Stanford-Binet is below age level he was unable to even take this test 1½ years ago and is now able to take this language based test. On the Vineland, Steven has grown 3 years over the past 1½ years in socialization and self help skills. Dr. Reed found "literally fantastic gains" between his 2 evaluations and noted that "By direct observation you would not realize that you were dealing with the same youngster." Dr. Reed testified that Steven continues to display tendencies that represent the residuals of the pervasive developmental disorder that he has, which Dr. Reed classified as quite mild now. Dr. Reed stated that Steven is now able to maintain eye contact, his socialization skills are clearly better and he now has overt, useful language. Dr. Reed testified and reported that it is his professional opinion that it is now time for Steven to be integrated into mainstream public school education with normal youngsters who will provide role models for Steven to act in a normal way. (See testimony, Dr. Reed; P-1; S-9).

Ms. Washington, Steven's case manager and one of his teachers for the last 1½ years at May, testified that when Steven started at May he was very limited with severe behavioral issues and little language but that he has made significant progress at May. Steven can now state his needs or request anything he wants; he knows his colors and numbers; his art skills and cutting skills are above average; and he can write his name and write simple phrases which are understandable if not grammatically correct. Ms. Washington perceives Steven's academic skills and fine motor skills to be age appropriate or higher and his receptive language skills and expressive language skills to be between a 2-3 year old level. (See testimony, Washington.)

STEVEN'S MAY PROGRAM

At May Steven has been/is in May's integrated pre-school where he is in a class of 14 students and 3 teachers with 7 developmentally delayed/autistic preschoolers and 7 normally

developing preschoolers. The age range is 3-5 years old with Steven currently the oldest student in the class. (See P-2, 2a & S-7 for further description of the May Program.)

If Steven were to remain at May for the next school year, he would have to be placed into one of May's ungraded elementary classes which is a non-integrated setting where Steven would be with 7-8 developmentally delayed/socially impaired/language impaired students and no typically developing peers. This placement is not recommended for Steven because he would be missing the current access to normally developing peers which Steven requires so that he can continue to develop his social and language skills. Steven has demonstrated at May that he learns a lot of language and social skills from having access to typical role models. Ms. Washington believes that placement in May's elementary class would be too restrictive and be a substantial setback for Steven. (See testimony, Washington).

With a waiver, Steven can remain in his current integrated pre-school class at May until January 1993. Because transition will be a big step for Steven, Ms. DiPietro testified that if it were certain Steven was going to be transitioned back to Sudbury prior to January 1993, May would leave Steven in his integrated pre-school class until he was transitioned to Sudbury so that Steven would not be forced to make multiple transitions from May's integrated pre-school to May's non-integrated elementary school and then to Sudbury. (See testimony, DiPietro; P-7).

SUDBURY'S PROGRAM

Beginning in September 1992 Sudbury will be implementing a full day mode program for kindergarten which, for Steven, would consist of $\frac{1}{2}$ day in the morning within a regular education kindergarten class and $\frac{1}{2}$ day in the afternoon receiving special education services and related therapies. While a typical kindergarten in Sudbury has a teacher and a $\frac{2}{3}$ time aide, this class of 18-20 students will have a teacher, a $\frac{2}{3}$ time aide, plus a full time special education aide for the 2 (or 3 including Steven) special education students who will be in the regular kindergarten class to facilitate integration, adjustment and assistance for the special education students. In the afternoon small group special education instruction will be provided to the 2-3 special education students and whatever therapies are required by the students-speech/language, occupational etc. - will take place.

All of the regular and special education teachers, therapists and aides/assistants have been chosen because of their expressed interest in participating in this program and they all have participated in 2 full day workshops over the summer. The teacher of the integrated kindergarten for the 1992-93 school year will be Judith Honens, a certified kindergarten teacher, who

has taught for a number of years in Sudbury; has worked successfully with special education students in the past; and has a good working partnership with the special education teacher who will be working with the 2-3 special education students in her class. The special education teacher will be Beth Brown who has 15 years of special education experience in Newton and Sudbury. For the past 2 years in Sudbury Ms. Brown's primary focus has been at the kindergarten and 1st grade levels helping to mainstream special education students into regular education classes and it is anticipated that she will visit the integrated kindergarten classroom on a frequent basis. The special education aide in the integrated kindergarten will be Sherry Borg who has 2 years of college education and has worked in Sudbury for the past 6 years. Ms. Borg has functioned as a teacher aide/assistant in integrated pre-school, kindergarten and 1st grade transitional programs and has been trained in behavioral modification strategies, alternative teaching techniques, developmental delay issues and language delay issue. Together with the kindergarten classroom teacher and the special education teacher, the aide/assistant's responsibility will be to facilitate adaptive behavior, help translate the environment when helpful, solicit and encourage appropriate student interactions, and help provide material adaptations so that the curriculum in the classroom can be most appropriate. The aide/assistant can also be detailed to places such as the students' lunch and/or playground to help the students develop good socialization groups and normal friendships. The speech language pathologist will be Lynn Brant who is a licensed speech language pathologist, has taught language classes, and who works in Sudbury's integrated pre-school and kindergarten classes. (See testimony, Byrnes; Merriman; S-10).

FINDINGS AND CONCLUSIONS

It is undisputed by the parties and confirmed by the evidence presented that Steven G. is a student with special education needs as defined under state and federal special education statutes and regulations. The issues to be determined have been specified under ISSUES IN DISPUTE, above.

Based upon almost 2 full days of oral testimony, the written documentation introduced into evidence, and a review of the applicable law, I conclude that:

I. The June 11, 1992 IEP meeting, whether considered an annual review meeting on a team meeting, was invalid. Therefore, the IEP resulting from that June 11, 1992 IEP meeting, as well as the subsequent changes to that IEP were equally invalid.

II. Steven should remain in his current program at the May Center until procedures have been followed and appropriate transition arrangements completed. However, Steven should be transitioned

to the Sudbury Public Schools into Sudbury's integrated kindergarten/special education full day program with transitional aide services no later than the end of the Thanksgiving vacation under the terms and conditions specified in the ORDER at the end of this DECISION.

My analysis follows.

I.

This is a most unfortunate case in which the actions of all of the principals upon whom Steven is dependent-Sudbury, May, and Parents - failed him, despite everyone's self perceived attempts to do what they believed was best for Steven at the specific points at which they took the actions they did.

Based upon the totality of testimonial and documentary evidence presented, I conclude that there was never a "meeting of the minds" between the parties at several critical junctures in this case, although the parties believed themselves to be in basic agreement. In actuality, there was no agreement regarding the purposes of various meeting dates, what each meeting was designed to accomplish, and which parties were responsible for carrying out what tasks for what IEP. Indeed, there was never a meeting of the minds on whether the parties were working on one IEP or two IEPs!

Specifically, there was no consensus at the May 20, 1992 transition planning meeting. At that point Parents believed everyone had agreed to all of May's suggestions, although both May and Sudbury realized these were just discussions and recommendations. As a result of the May 20, 1992 transition planning meeting there was no consensus regarding the development of an IEP or IEPs. May/Parents believed that May would be working on the summer component of Steven's IEP; Sudbury would be working on the school year component of the IEP; and that at the June 11, 1992 IEP meeting the parties would come together and write a June 1992 to June 1993 IEP calling for Steven's 1992 summer placement at May with a transition to Sudbury in September 1992. In essence, May/Parents believed that the parties were working on different parts of the same process. (See testimony, DiPietro; Washington). Sudbury believed that the May 20, 1992 transition meeting which then led to the June 3, 1992 meeting between Sudbury's representative, speech language pathologist Brant, and May/Parents representative, Ms. Washington, to develop a transitional IEP was one process regarding Steven's transition back to Sudbury in September 1992 under a separate IEP. (See S-10 Draft IEP which had been in process). Sudbury believed that the June 11, 1992 IEP meeting was a separate IEP process to finalize Steven's 1992 summer placement at May. (See testimony Merriman; Byrnes). In essence, Sudbury believed two separate processes leading to two different IEPs were taking place. May's

perception is understandable and certainly has a rational symmetry to it in terms of coordination. However, Sudbury's perception is also logical in that Steven's summer placement was, in effect, a 502.8/502.5 out-of-district May placement with its own program description in one location with its own set of service providers and May having primary direct service responsibility. In contrast, the transition/school year IEP would involve a different prototype (502.3), in a different location within the Sudbury Public Schools, in a new and different program with a totally different set of service providers, with Sudbury assuming primary and direct programmatic and direct care service responsibility. Therefore, one IEP combining such diverse components becomes illogical while two separate and distinct IEPs, one for the 1992 summer at May and one for the transition to Sudbury, makes eminent sense. Unfortunately, the parties never bridged their gap in understanding each others' perspective.

Most importantly, under 603 CMR 28.333.0 Review of the child's progress: Ten-month and annual review, it is provided under Regulations 333.5(a):

A new IEP shall be written for any child for whom a more or less restrictive environment is recommended.
Emphasis added.¹

In the original page 3A (P-3) of its proposed IEP for Steven, May characterizes the June 11, 1992 meeting as an amendment meeting:

Because no representatives from Sudbury Public Schools were able to attend the June 11, 1992 IEP amendment meeting, the remainder of the TEAM was unable to develop a plan for Steven's proposed transition to Sudbury Public Schools in September 1992. Emphasis added.

Steven was scheduled to be transitioned from May, a more restrictive environment/prototype, to Sudbury into a less restrictive environment/prototype. Pursuant to 603 CMR 28.333.5(a) a new IEP, not an amendment, must be written under such circumstances. Legally, therefore, May's characterization of the June 11, 1992 meeting as an amendment meeting supports Sudbury's contention that the June 11, 1992 meeting was an amendment meeting to extend Steven's placement at May throughout the 1992 summer and not a meeting to promulgate a full year IEP in 2 difference placements with Steven transitioning into a less restrictive environment.

¹ Regulation 335.5(b) delineates those situations in which an IEP may be written as an amendment rather than as a new IEP.

Further, there apparently was never any consensus between Sudbury and May/Parents regarding aides - at either the May 18 meeting, the May 20 meeting or June 11 meeting - in terms of necessary training/experience, amount of observational time to be spent at May, or what a 1:1 aide meant to May as opposed to the plain meaning of the term 1:1. (See testimony, DiPietro; Washington; Byrnes. Also to be discussed further, below).

Finally, neither Sudbury nor May apparently understood the law that whether the June 11, 1992 meeting was characterized as a team meeting (603 CMR 28.314.0, 314.1) or an annual review (603 CMR 28.333.0, 333.1), a Sudbury representative was obligated to attend the meeting either as the chairperson or at least as a member of the team or review meeting. Even though May may have been providing the direct service delivery, any IEP produced is legally Sudbury's IEP and is ultimately Sudbury's responsibility. Therefore, the June 11, 1992 meeting itself; the action taken by the participants at that meeting; and the IEP promulgated as a result of that meeting were all invalid. Because the June 11, 1992 IEP meeting and the resultant IEP were invalid; and also because Parents were not involved in the subsequent changes to the IEP (See the same regulations cited above); the subsequent actions of Dr. Byrnes in altering and extending the IEP, despite the mutual consent of Ms. DiPietro, were likewise invalid.

I am not unsympathetic to the scheduling problems of Sudbury, May and Parents, especially as the school year drew to a close. However, when it became clear that no representative of Sudbury would be able to attend the IEP meeting on June 11, 1992, such meeting should have been rescheduled. If this action had been taken and all parties could have been present to clarify their respective positions, a great deal of time, energy, effort and expense could have been saved.

I am most concerned about Ms. Merriman's testimony that in her role as Sudbury's liaison to out-of-district placements she attends 90% of the IEP meetings but is unable to attend about 10% of them. Her testimony was substantiated by the testimony of Dr. Byrnes that it would be ideal if Sudbury could attend all of these meetings but sometimes, especially at the end of the school year, Sudbury cannot make all of these meetings. Such non-attendance by Sudbury at out-of-district team/review meetings is not only less than ideal - it invalidates the meetings, any actions taken, and any IEP promulgated as a result of such meeting as it did in the instant case. Sudbury's 10% non-attendance at such meetings could conceivably result in similar scenarios in the future with different private schools and different parents if there are any misunderstandings or miscommunications as occurred in this case. Additionally, from a purely pragmatic administrative perspective, it is unwise for Sudbury, which is ultimately responsible for the student's IEP regardless of the fact that a private school is providing the

student's daily services, to effectively cede its oversight responsibilities. Such action, or rather lack of action, creates a void. In this case, based upon misunderstanding and miscommunication, May stepped into the void created by Sudbury in its attempts to protect Steven.

Parents must largely depend upon professionals in this process and neither Sudbury nor May deserve kudos for their clarity of thought, expression or action during this process. However, Parents also must accept the responsibility for their actions which contributed to the confusion which resulted in the delay of Steven's transition to Sudbury. By having Steven privately evaluated on May 6, 1992; by not making that fact known to either Sudbury or May during the transition process and the multiple meetings held in May and June 1992; by not sharing the results of such evaluation with either Sudbury or May prior to the June 11, 1992 IEP meeting even though Parents had the results of such evaluation at least several days prior to such meeting (Parents had the evaluation results at least as early as June 9, 1992 -- See P-5; S-8)²; and by writing to May and Sudbury that the results of such evaluation indicated that Steven was at a critical level when such evaluation actually did not say that, as well as demanding that certain service levels for Steven be incorporated into his IEP which turned out to be not actually what May was recommending (P-5; S-8; testimony DiPietro; Washington); Parents raised a red flag to Sudbury which justified its reaction. Any transition is always a delicate process and is always disruptive to a child, especially a child with special needs. For a child such as Steven with pervasive developmental disorder and autistic tendencies, any transition should be handled with particular care which is demonstrated by May's concern about the shortness of the transition planning time from late April to early September to begin with. Upon Sudbury's receipt of Parents' letter on June 12, 1992 divulging the existence of a new evaluation with new information on Steven as yet unseen by May and/or Sudbury; describing Steven as being at a critical level; and demanding services that the parties had not agreed to either in that form or with that degree of intensity; at precisely the point Sudbury was about to send Parents a draft IEP to transition Steven back to Sudbury; Sudbury had little choice but to attempt to stop or delay the transition process until this new evaluative information was shared and Steven's current situation and needs were clarified. To have done otherwise would not have been in Steven's best interest and, in

² Not even during Ms. Merriman's June 9, 1992 phone call to Mrs. G. in which she informed Mrs. G. that she would be unable to attend the June 11, 1992 IEP meeting and they discussed transition issues and the issue of an aide did Mrs. G. disclose that Steven had been privately evaluated and Parents had received the results. (See CHRONOLOGY, above).

fact, would have been negligent and irresponsible.

This case is replete with if only's: if only May and Sudbury had understood each other regarding the promulgation of IEPs for Steven; if only May and Sudbury had understood each other regarding aide qualifications and use with Steven; if only Ms. Merriman had attended the June 11, 1992 IEP meeting; if only Parents had made May and Sudbury aware that Steven was being evaluated at NEMC and had shared the results in a timely manner....

II.

While the prior section of this DECISION deals primarily with misunderstandings and miscommunications, this section does not. Based upon the testimony from Ms. DiPietro, Ms. Washington, Ms. Merriman and Dr. Byrnes, I conclude that all of the educational professionals testifying at this hearing, whether from May or Sudbury, while having some differences of opinion, all are in essential agreement regarding the following points:

1) Steven should not be transitioned to Sudbury until Sudbury is prepared to take him and all preparations/arrangements have been made and appropriate supports are in place to insure a transition for Steven that is as smooth as possible.

2) Sudbury's proposed integrated kindergarten is a structured, adequately staffed program which, when combined with special education services and therapies in the afternoon, should provide Steven with an appropriate integrated kindergarten/special education full day program which is what he requires.

3) Steven is capable of being transitioned into Sudbury's proposed program with appropriate support and assistance prior to and during his transition into this new program.

4) Such transition should be able to take place prior to January 1993.

I acknowledge Parents' fervent desire for Steven to begin in Sudbury in September 1992 with his new classmates. However, I find that given the circumstances of this case as they have unfolded leading to the instant hearing (See CHRONOLOGY, above), none of the professionals testifying at this hearing advocate such a course of action. Indeed, all of the educational professionals testified that Steven will have transition issues when he moves from May to Sudbury no matter when that transition takes place; and that what is most important is that all parties be as well prepared for the transition as possible with all necessary supports in place in order to assure that Steven's transition into the Sudbury Public Schools will be successful.

Finally, I address the issue of aide services for Steven. On page 3A (P-3) of its June-August IEP, May made several recommendations regarding Steven's aide:

1) In order to succeed in a kindergarten class Steven will need the assistance of a full-time 1:1 aide with training and experience in the following areas: May then listed 7 areas a through g. (See P-3).

2) If Sudbury does not currently have a person who meets these recommended qualifications, the May Center would be willing to provide training for an aide, to last for 3-6 weeks depending on the qualifications of the person selected.

Regarding the 1st recommendation, Sudbury was shocked at May's recommendation for a 1:1 aide since in all prior discussions May had never mentioned the necessity of a 1:1 aide. Clearly, in the standard and ordinary use of language, a 1:1 aide means just that: an aide whose sole and exclusive responsibility is to one individual student. However, as Ms. DiPietro later told Dr. Byrnes during their June 12, 1992 telephone conversation and also testified at this hearing, May understood that the Sudbury special education aide would be for two other students in addition to Steven. By its 1:1 language May wanted to insure that should the other 2 children not require an aide and the aide was considered being removed from the class, that Steven still specifically required the assistance of an aide and that some protection was built in for Steven. Ms. DiPietro testified that when May says 1:1 aide it does not want that aide glued to the child. Rather, May wants someone who knows that child very well but who is functioning as another staff person with all of the children in the classroom. However, that aide should be very knowledgeable about Steven and aware when Steven needs specific help. Ms. Washington testified similarly that a 1:1 aide meant someone who would be in the classroom, knowledgeable about Steven and available for Steven when he needed assistance. Indeed, Ms. Washington testified that May is not recommending a 1:1 aide exclusively for Steven because he is often capable of functioning within the classroom without aide assistance; that it is important for everyone in the class to get to know Steven because he needs to learn to generalize his skills with all individuals in his environment; and that if Steven had an individual 1:1 aide Steven might only work for that aide and he might not generalize his skills and behaviors to the teacher and other students in the class. Ms. DiPietro testified that she informed Parents of May's meaning of a 1:1 aide as described above. Unfortunately, the IEP as written by May did not explain May's intent nor provide a definition of what May meant by its use of the term 1:1 aide. Nor apparently, did Parents fully understand May's peculiar use of the term 1:1 aide.

Regarding May's 2nd recommendation on page 3A, it was a conditional one i.e. if Sudbury did not have an aide with the qualifications and experience May believed necessary, May would be willing to train an aide for 3-6 weeks depending upon that person's qualifications. The 3-6 weeks training presupposed that the aide did not have prior sufficient training. (See also testimony, DiPietro). Dr. Byrnes and Ms. Merriman have testified that Sudbury aides are trained and experienced in the areas May has delineated and Dr. Byrnes testified regarding the qualifications and experience of the special education aide assigned to Steven's proposed kindergarten class. (See SUDBURY'S PROGRAM, above; testimony, Byrnes; Merriman). Since the Sudbury aide for Steven's proposed kindergarten class has the qualifications and experience listed by May, I conclude that such aide would not require 3-6 weeks of training by May prior to Steven's transition.

What is clear from the testimony of Ms. DiPietro and Ms. Washington is that Steven is a complex child with a different learning style and it is important for the aide to familiarize herself with Steven, how he functions, and to get to know him well by the point in time when he enters the Sudbury program. The aide must be aware of what things motivate Steven to learn, communicate, socialize, behave and progress without over challenging him and provoking inappropriate behaviors which Steven has now largely extinguished. The aide must learn how Steven reacts to and interacts with adults and peers, which actions positively reinforce him and what actions negatively affect him. May wishes to share this information with the aide who can then not only utilize this knowledge with Steven but also share it with others in Sudbury. Sudbury proposes that the aide visit May, speak with staff and observe Steven for several days prior to his transition. Ms. DiPietro testified that it may take a couple of weeks to orient the aide to Steven and his learning style. Given everyone's concern that Steven will not be an easy child to transition; and given that no one wishes for Steven's progress at May to be compromised; I find that Sudbury's proposed 2 days observation/interaction is insufficient. However, May's broad recommendation of a few weeks may be more than is necessary. I conclude that a minimum of 6 days to a maximum of 10 days should be sufficient for the aide to familiarize herself with Steven as described in this paragraph. Whether 6, 7, 8, 9 or 10 days is necessary should be determined as the aide gets to know Steven and discovers her ability to interact and work with him.

ORDER

1) The June 11, 1992 IEP meeting; the IEP promulgated as a result of the June 11, 1992 IEP meeting; and the subsequent changes to this IEP made by Sudbury Public Schools and assented to by The May Center; are all invalid.

2) Sudbury is to make all necessary arrangements to review Dr. Reed's/New England Medical Center's May 6, 1992 evaluation of Steven; to obtain parental consent for any additional evaluations it wishes to perform; to perform such evaluations if consented to by Parents; to make any further inquiry of Dr. Reed; or to do anything else; so that a TEAM Meeting including appropriate Sudbury personnel, May personnel and Parents shall take place no later than September 30, 1992.

3) An IEP delineating Steven's transition into Sudbury Public Schools' integrated kindergarten/special education full day program, as such program was described by Dr. Byrnes, Ms. Merriman and Exhibit S-10 at this BSEA hearing, with the amplification specified in #4 below, is to be promulgated and proposed to Parents no later than October 15, 1992.

4) Unless otherwise agreed to by the parties at the TEAM Meeting, the full time special education aide/assistant assigned to Sudbury's integrated kindergarten program proposed for Steven shall spend no less than six (6) nor more than ten (10) full school days at The May Center to observe and familiarize herself with Steven's learning style and behavioral style; the techniques which work best with Steven; and to get to know Steven; prior to his transition to Sudbury. At least 4 of the 6-10 days should be on consecutive days i.e. Monday - Tuesday, Thursday - Friday, Friday - Monday. At least 2 of these 6-10 days should be immediately prior to the actual physical transfer of Steven from The May Center to Sudbury Public Schools to insure continuity and as smooth a transition as possible for Steven.

5) Assuming Parents accept Sudbury's IEP for Steven in a timely manner, the actual physical transition of Steven from The May Center to Sudbury's integrated kindergarten/special education full day program shall take place no later than the Thanksgiving holiday vacation. With all parties consent such transition can, of course, occur sooner.

6) Until Steven's transition to Sudbury Public Schools is completed according to the terms and conditions specified in this ORDER, Steven shall remain at the May Center in his integrated pre-school placement. Sudbury Public Schools remains financially

responsible for the continued funding of Steven's May School placement throughout the 1992 summer and into the 1992-93 school year until his actual physical transfer to Sudbury.

Dated: September 16, 1992



Raymond Oliver
Hearing Officer
Bureau of Special Education Appeals

7/29/92

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: DAVID D.

BSEA # 93-0146

ORDER JOINING BRISTOL-PLYMOUTH
VOCATIONAL TECHNICAL SCHOOL DISTRICT

This case involves the request of the parent of David D. for an emergency placement order under Section 327.1 of the Chapter 766 Regulations, placing David in a residential special education program. David does not have an individualized educational plan (IEP). David is a resident of the Town of Middleborough. He attended Middleborough High School through February of the 1991-1992 school year. He then transferred to Bristol-Plymouth Vocational Technical School District, where he completed the 1991-1992 school year. On July 16, 1992, a form withdrawing the student from Bristol-Plymouth was signed by David's parent and advocate. At the same time the parent and advocate made a request of the Middleborough Public Schools that David be evaluated, identified, and placed in a residential special education program on an emergency basis. They also filed an emergency hearing request with the Bureau of Special Education Appeals (BSEA) on July 16, 1992, naming Middleborough Public Schools as the responsible school district. (The hearing request was erroneously dated July 17, 1992, but was received by the BSEA on July 16, 1992.)

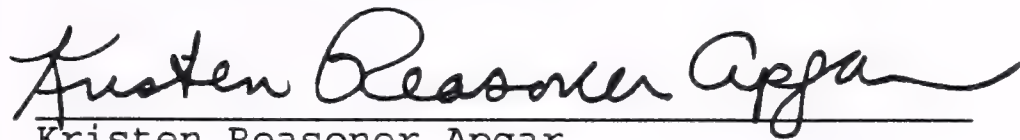
Middleborough has filed a Motion to Dismiss the Hearing Request or in the alternative a Motion to Join Bristol-Plymouth Vocational Technical School District, arguing that under the Chapter 766 Regulations, Bristol-Plymouth is the school district responsible for David's special education program.

Section 337.0 of the Chapter 766 Regulations sets out the circumstances under which vocational technical schools may be required to provide appropriate special education to students attending their schools. Section 337.1 provides that vocational technical schools are responsible for providing appropriate special education to students who enter their school district without having an IEP, including where necessary the provision of a day or residential special education program. I find that in order to fully adjudicate the question of appropriate school district responsibility for David's special educational needs, it is necessary to join Bristol-Plymouth Regional School District as a party to this proceeding. Accordingly, by this order I am joining Bristol-Plymouth Regional School as a party to this proceeding, pending the order of an interim placement under Section 327.1 of the Chapter 766 Regulation for David and a determination of which educational agency, Middleborough or

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Bristol-Plymouth, is responsible for providing that placement under state and federal regulations.

By the Hearing Officer



Kristen Reasoner Apgar

Date: July 29, 1992

8/17/92

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: DAVID D.

BSEA NO. 93-0146

DECISION

I. INTRODUCTION

This case involves a request for emergency placement in a residential special education program made by the parent of David D., under Paragraph 327.1 of the Chapter 766 Regulations. (603 C.M.R. s.28.0.327.1.) David D. does not currently have an individualized educational plan (IEP), nor has he been identified by the Middleboro Public Schools in the town where he resides as a special needs student. During the 1991-1992 school year David attended Middleboro High School as a regular education student. In March 1992 he transferred to Bristol-Plymouth Regional Vocational Technical School (Bristol-Plymouth), where he completed the school year as a regular education student. On July 16, 1992, Mrs. D. signed a form withdrawing David from Bristol-Plymouth. On the same day she asked Middleboro Public Schools to conduct an emergency TEAM evaluation, and to place David in a residential special education program pursuant to that evaluation. On July 16, 1992, the parent also filed a request for an emergency hearing with the Bureau of Special Education Appeals (BSEA), asking that the BSEA order Middleboro Public Schools to place David in a residential special education program.

On July 23, 1992, Middleboro filed a Motion to Dismiss the parent's hearing request, arguing that David's special education program was the legal responsibility of Bristol-Plymouth. In the alternative Middleboro asked that Bristol-Plymouth be joined as a party to the hearing. Bristol-Plymouth was joined as a party on July 29, 1992, and the Motion to Dismiss was taken under advisement pending the issuance of this decision.

A hearing involving the parties took place on July 29, and August 5, 7, 1992, at Middleboro High School. The following individuals were present at some or all of the proceeding:

Mrs. D.	Parent
Mrs. O.	Family Friend
Michael Jeffrey Green	Psychologist and Consultant School Psychologist, Bristol-Plymouth
Robert Dumais	Special Education Administer, Bristol-Plymouth

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Stephen McIntosh	Director of Pupil Personnel, Bristol-Plymouth
Thomas Petrouski	Special Education Administrator, St. Vincent's Home
William Dickson	Case Manager, Cape Psych Center
Alice Zimmerman	Educational Coordinator, Cape Psych Center
Stephen Serry	Pupil Personnel Director, Middleboro
Shirley Gorzynski	Parent Advocate
David A. Biltcliffe	Attorney for Parent
Regina W. Tate	Attorney for Middleboro
Kristen Reasoner Apgar	Hearing Officer

The entire record of the proceedings consists of approximately 10 hours of recorded testimony, Middleboro's documents, numbered S-1 through S-11, and the Parent's documents, numbered P-1 through P-13. (Bristol-Plymouth did not offer any documentary evidence, but relied on that submitted by the parent.) Each party filed written submissions on the issue of which school district was responsible for provision of appropriate special education to David D., and the parent and Middleboro filed closing argument regarding the placement required for David. The record closed on August 7, 1992.

II. ISSUES:

1. Which public school district, Middleboro or Bristol-Plymouth, is legally responsible for provision of special education for David?
2. Is David entitled to an emergency placement in a residential special education program, pursuant to Paragraph 327.1 of the Chapter 766 Regulations? If not, what placement, if any, should be ordered?

III. POSITIONS OF THE PARTIES:

A. PARENT'S POSITION:

The parent argues that David's emotional/psychological needs are of such intensity that he cannot succeed educationally, unless he is placed in a residential program geared to meeting his need for a total therapeutic environment and able provide appropriate academics in a small group setting. In her opinion David presents a present danger to himself and others, and cannot be educated in the regular public school environment. She also argues that David's special education needs were known to Middleboro, but that it failed to identify David as in need of special education or to provide proper services. The parent opposes a finding that Bristol-Plymouth is required to provide a

residential program for David, arguing that such a finding would be inconsistent with the Chapter 766 regulations or the provisions of federal law.

B. Middleboro's Position:

Middleboro argues that it is not the educational agency obligated to provide special education to David, since David entered Bristol-Plymouth in March 1992 as a regular education student. Therefore, under Regulation 337.1, Bristol-Plymouth is obligated to provide those special education services that David is found to need. Middleboro also argues that there is insufficient evidence to conclude that David requires a residential special education program for educational, rather than familial reasons, or indeed to make any determination regarding David's special needs in light of the limited evaluative information present on the record.

C. Bristol-Plymouth's Position:

Bristol-Plymouth takes no position on the question of David's special education needs, but argues that it is not responsible for providing special education services to David, if he is found to need such services, because David's mother withdrew David from Bristol-Plymouth.

IV. FINDINGS

A. Profile and History:

David is a fifteen year old boy with a history of emotional difficulties, apparently stemming from family conflicts in his early childhood. Over the years he has suffered the loss of his own father, due to divorce, the death in 1987 of a male friend of his mother, who was important to David, and the stresses of living in a blended family. David received private counseling outside of school between ages 5 and 7. (Exh. S-3, P-3, P-5)

However, until his was in sixth grade, David appears to have performed well in the school setting. David's cognitive potential has been found to be in the high average to superior range. (See, Exh P-3) While there do not appear to have been any difficulties in school, Mrs. O, a family friend, described an incident, which occurred in her home when David was in sixth grade. David became uncontrollably angry at her son, and was unable to respond to her efforts to prevent him from hurting her son. Afterwards David seemed uncertain about what had happened or what had he had done. (Testimony of Mrs. O.)

In seventh grade David attended junior high school in

Middleboro, where he was in a regular education. David began to have difficulties in school, consisting of frequent tardiness, disorganization, and poor academic performance. David's mother reports that David would leave for school with ample time to complete the short walk to school, but as much as an hour would pass by and he would not have arrived at school. David seemed unable to explain why he was late. David's teachers also complained that he seemed out of touch and irresponsible. As a result his schoolwork suffered, and his teachers and mother referred him for a special education evaluation. A comprehensive evaluation was performed for Middleboro by the staff at Regional Educational Assessment and Diagnosis Services (READS) in May 1990. (Testimony of Mrs. D., Mrs. O.; Exh. P-3)

The READS Report described David's behavior in the school setting as emotionally withdrawn and lethargic, with occasional periods where he appeared disoriented. At home he was described as having periods of moodiness and withdrawal with alternating periods of noncompliance and angry outbursts. The evaluators described David as moderately sad. Academic and intelligence testing showed David to be in the high average to superior range. His scores on achievement tests were well above grade level in reading, spelling, and arithmetic. Projective testing, however, evidenced low esteem. David reported difficulty in establishing and maintaining friendships, and feelings of sadness and loss connected with his family. There was also evidence of conflicted feelings about his mother with a tendency on David's part to be easily provoked to anger. (Exh. P-3)

The READS Report concluded that David would benefit from psychotherapy in order to address issues related to low self-image. It also recommended the provision of special education support to remediate gaps in educational achievement that resulted from David's emotional interference and to provide him with guidance and support in completing his school assignments. Finally, the report called for adjustment counseling in school to provide David with personal support and guidance in adjusting to peers in the school setting. (Exh. P-3)

However, notwithstanding the recommendations of the READS evaluation, the TEAM, at a meeting convened on June 18, 1990, made a finding of no special needs. There was a recommendation for completion of a neurological evaluation of David, a reduction in class level, and consideration of group counseling. The finding of no special needs was accepted by Mrs. D. at the TEAM meeting, although she testified that she did not agree with the finding but did not understand that she could challenge it. With the exception in reduction in class level, the recommendations do not appear to have been implemented by Middleboro. (Testimony of Mrs. D., Exh. S-4)

Because of David's difficulties in seventh grade, Mrs. D.

sought help for David through private counseling, provided by Robert Falzone during the period March through June 1990. Mr. Falzone described David as a child who presented in school as withdrawn, immature, and disorganized, and at home as moody and withdrawn, but at other times expressing violent anger, screaming and sometimes breaking objects, although not engaging in assaultive behavior. Falzone diagnosed David as having depressive disorder. (Exh. S-3)

Falzone directed part of David's therapy to helping him deal with his problems in completing schoolwork, especially English, where he had great difficulty with a writing assignment, which involved writing about himself and his family. Falzone also attempted to help David deal with his outbursts of anger, which David felt he could not control. However, at the end of the 1989-90 school year, therapy was terminated, apparently at David's request. David reported to Mr. Falzone that things were "better," because school was over for the year. (Exh. S-3, P-4).

David was able to complete seventh grade with grades of C in all subjects, except English, where he received an F. (Exh. P-10)

In the fall of 1990 (eighth grade), David continued to have trouble in school, because of his inability to complete the schoolwork. He also continued to evidence outbursts of violent temper at home, directed at his mother and sister. At Mrs. D.'s request, David's family doctor referred him to Michael Jeffrey (Jeff) Green, a licensed educational psychologist with a private practice at the Family Center for Counseling and Education. (Mr. Green also serves as a part-time school psychologist for Bristol-Plymouth.) (Testimony of Green, Mrs. D.; Dxh. P-5)

Mr. Green saw David as a guarded, withdrawn youngster, suffering from mild depression, who had difficulty with relationships, resulting in passive behavior with intermittent explosive anger. Mr. Green assisted Mrs. D. in implementing a behavioral program for David, which rewarded David for controlling his anger around home and for completing his school assignments. He and Mrs. D. arranged with David's teachers to send home weekly reports letting Mrs. D. know if David had completed his work. Under this system David was able to complete the eighth grade with somewhat improved grades. (Midyear he had an A, 2 - C's, and 2 - F's in social studies and science. At the end of the year, he had passed all of his subjects.) (Testimony of Green; P-5, P-10)

At the end of eighth grade, therapy was terminated, again apparently at David's request, since David thought he could handle his problems without it. Mrs. D. agreed to allow David to try the next school year without the behavior management program

instituted by Mr. Green. (Testimony of Green, Mrs. D.)

David entered 9th grade at Middleboro High School in September 1991, where he continued in regular education classes. David immediately started to have difficulties with school. For the first grading period, he received F's in English, Algebra, and Science; the second grading period, he received F's in French and Science, although he had improved his grades in English and Algebra. Teacher comments cited lack of effort, failure to work to capacity and missing assignments. (Exh. P-10)

A few months later, David and Mrs. O's son were involved in several incidents where they broke into houses in Middleboro and a neighboring town. One of the houses belonged to a teacher at the high school. Both boys were arrested and charged with breaking and entering. (Testimony of Green, Mrs. D., Mrs. O.; Exh. P-5)

Sometime following this incident, the boys were physically threatened by some students at the high school, who were angry about the damage to the teacher's house. David was deeply frightened by the threats, and continues to fear even entering Middleboro High School. (Testimony of Green, Mrs. D., Mrs. O; Exh. P-5)

On February 24, 1992, David and Mrs. O's son left school without permission, apparently acting on David's suggestion that they run away. Much later in the day they were picked up by the police in another town, suffering from cold and exposure. During this incident David told Mrs. O's son that he had nothing to live for, that he was going to run away, and that he did not care if he died. (Testimony of Mrs. O., Exh. P-5)

Concerned over her son's emotional state, Mrs. D. asked Mr. Green to resume David's therapy, which he agreed to do. Mr. Green volunteered to intervene with officials at Middleboro High School and Bristol-Plymouth to see if David could transfer to Bristol-Plymouth, even though it was the middle of the school year. Mr. Green felt that he might be able to use his therapeutic relationship with David, coupled with his role as part-time school psychologist at Bristol-Plymouth to help David do better in school. At Bristol-Plymouth, Green could intervene with David's teachers, if David was not completing his work, and to avoid any incidents with peers at school. (Testimony of Mrs. D., Green)

At Green's request, Stephen McIntosh, Director of Pupil Personnel at Bristol-Plymouth and director of admissions, agreed to consider admitting David to Bristol-Plymouth. Mr. Green related to Mr. McIntosh the breaking and entering charge against David and the incidents at Middleboro High School. Green also told Mr. McIntosh that David was receiving therapy from him, and

that he wanted to help out by being available to David while at Bristol-Plymouth, if needed. He did not relate any other information regarding David's prior school experiences with Middleboro, or suggest the possibility that David should be referred for a special education evaluation. He also did not inform Mr. McIntosh that David was being treated with anti-depressant medication. (Testimony of Green, McIntosh, Dumais)

McIntosh on his own checked with an official at Middleboro to see if David had an IEP. He was told that he did not. No information regarding the earlier TEAM meeting or other school problems appeared to have been relayed to McIntosh or any other official at Bristol-Plymouth. On this basis David was permitted to transfer to Bristol-Plymouth in March 1992. (Testimony of Green, McIntosh)

David resumed private therapy with Mr. Green. David was apparently deeply frightened at the prospect of criminal prosecution. In anticipation of the court proceedings Mr. Green conducted a psychological evaluation of David on March 24, 1992, with particular focus on projective testing. He found David to be unusually self-deprecating, and extremely vulnerable. He questioned whether David was able to cope with his current life stresses. He also noted that David exhibited a high degree of impulsivity, angry outbursts with alternating depression, and moodiness. He did not find David to be psychotic or at risk for suicide, but rather moderately depressed, although he noted that David had talked about suicide when he and his friend ran away from school. He also commented on the extreme mood swings described by David's mother. Overall, Mr. Green recommended that David attend Bristol-Plymouth, that he continue in psychotherapy, and that he be seen by a psychiatrist for possible medication for depression. (Testimony of Green; Exh. P-5, P-6)

David was seen by Dr. Cwira Richter, a Psychiatrist with whom Mr. Green is associated in his practice. Dr. Richter prescribed anti-depressant medication to address David's mental condition. She also apparently recommended to Mr. Green that a residential placement be considered, but Green wanted to give David the opportunity for a second chance in a new public school setting. (Testimony of Green, Exh. P-6)

David attended Bristol-Plymouth from March 1992 until the conclusion of the school year in mid-June 1992. He was able to maintain grades in the B and C range for that period, and although there seems to have been some evidence of problems with completing school work, his overall performance was satisfactory. He would have been able to enter his sophomore year at Bristol-Plymouth had his mother not withdrawn him from school. (Testimony of McIntosh, Dumais, Exh. P-10)

B. Current Profile and Evaluations

Approximately three weeks after the close of the school year, David's emotional state appears to have deteriorated. David and his mother had a particularly emotional disagreement over a letter David received from a former girlfriend, which led Mrs. D. to fear that David would harm her, his sister, or himself. Mrs. D. contacted Jeff Green. David was referred to the Department of Mental Health Area Crisis Intervention Team by his psychiatrist, Dr. Richter. The crisis team diagnosed David as suffering from major depression. At their recommendation David was hospitalized at Cape Cod Hospital at the Psych Center on June 29, 1992, where he was treated until being discharged on July 21, 1992. (Testimony of Mrs. D., Green; Exh P-9)

Staff from the Cape Psych Center evaluated David with respect to signs of psychosis, suicidal ideation, depression and/or head trauma. They also evaluated family issues. The discharge summary recounts the initial admission report given by Mrs. D. that David evidenced acute suicidal urges, explosive rage reactions, and a precipitating incident involving the letter from the former girlfriend. The evaluators found David's EEG to be normal and no evidence of neurologic disorder or seizures. They also found no evidence of psychosis. (Testimony of Dickson; Exh. S-11)

Throughout his hospitalization David denied any suicidal ideation, and Cape Psych Center staff concurred. They also found no evidence of aggressive ideation while at the hospital or at discharge. Although David did not feel that he needed to be hospitalized, he cooperated with the staff at the Hospital, and participated fully in the treatment and educational program while there. David told Jeff Green that while at the hospital he had finally found people who were able to understand him. He was able to express some hope for the future. (Testimony of Dickson, Zimmerman; Exh. S-11)

The Cape Psych staff felt that David was able to express appropriate remorse for his previous anti-social activity and was saddened about the difficulties his Mother expressed with regard to his behavior at home. David told staff that he was pleased with the progress he made at Bristol-Plymouth, and that he wanted to continue there. David wanted a second chance with his mother, and did not want to go either to foster care or to a residential program. (Testimony of Dickson; Exh. S-11)

The staff of the Cape Psych Center did not recommend a residential treatment program upon discharge, although they expressed the view that David should not live at home. In their opinion consideration should be given to involving the Department of Social Services (DSS) in order to arrange for an alternative living situation for David, such as foster care. In addition,

the dosage for David's anti-depression medication was increased to what the treating physician considered to be a therapeutic dosage. William Dickson, David's caseworker at the Psych Center testified that in his opinion David's emotional needs were not as severe as those of students he was familiar with who have been placed in residential special education schools dealing with students who have significant emotional/behavioral needs. (Testimony of Dickson; Exh. S-11)

In contrast Jeff Green no longer felt that David could successfully return to Bristol-Plymouth, or any regular school program, based on what he perceived to be David's deteriorating mental state. In Green's view, David is under such stress that he will eventually act out impulsively in the school setting, as he already does at home. He could go from being passive to explosive at any point, even with out-patient psychotherapy and in-school counseling, such as Green was able to provide for David at Bristol-Plymouth. Green did not believe that Bristol-Plymouth was equipped to provide David with the therapeutic setting that he needed to succeed in school. He also did not believe that a therapeutic day school would be sufficient, as it would not address the stresses that David experienced in his living situation. Mr. Green did not think that David's stated opposition to attending a residential special education school would prevent such a placement from being of assistance to David, nor did he think that David would be uncooperative, if such a placement were ordered by the BSEA. Jeff Green's position was supported by Dr. Richter, who diagnosed David's current state as one of severe, aggressive conduct disorder and intermittent explosive disorder. (Testimony of Green; Exh. P-6)

V. RULINGS AND ORDER

A. SCHOOL DISTRICT RESPONSIBILITY (MIDDLEBORO'S MOTION TO DISMISS)

Throughout this hearing, the Middleboro Public Schools have argued that Bristol-Plymouth Regional Vocational Technical School is responsible under the Chapter 766 regulations for providing special education for David, if he is found to be in need of special education. Bristol-Plymouth and the parent have contested this position. Bristol-Plymouth argues that David is no longer enrolled in their school, so they are no longer responsible for providing education to David, and that David should have been identified as a special needs student prior to admission to Bristol-Plymouth. Mrs. D., through her advocate, also argues that the Chapter 766 Regulations never require a vocational technical school to provide a day or residential special education program to a student enrolled in its district.

Section 337.0 of the Chapter 766 regulations provides that regional vocational technical schools are required to provide appropriate special education to the students enrolled in their schools. Section 337.1(a) states that:

If a child is enrolled in a regional vocational technical school district . . . and entered the school without an IEP under these regulations, the governing body of the regional vocational technical school district shall be responsible for providing the child with an evaluation if one is requested under par. 311.0, and any special education and related services under par. 502.0 and 503.0 and Chapter 8 of these regulations that are recommended in the IEP and consented to by the child's parent or ordered pursuant to these regulations.

Sections 502.0 and 503.0 of the Chapter 766 regulations cover the entire range of special education and related services, which a child may receive under state and federal law. Under Section 337.1(a), if a student is in need of residential special education and enrolled in a vocational technical school without an IEP, the vocational technical school is legally obligated to provide those services. In the case before me, David D. entered Bristol-Plymouth as a regular education student without an IEP. If he had been referred for an evaluation, and the evaluation TEAM determined that he was in need of a residential special education program while he was enrolled in Bristol-Plymouth, it would have been Bristol-Plymouth's responsibility to provide such placement. Section 337.1(a) provides an objective standard for determining the scope of the vocational technical school district responsibility, namely did the student enroll with an IEP. Objectively, David enrolled at Bristol-Plymouth without an IEP. In my opinion, it is irrelevant for the purpose of application of this section, whether one could argue that David "should" have had an IEP when he entered. Objectively, he did not.

Similarly, the term "enrolled" must be construed literally. At the time that David's mother referred him to Middleboro for an emergency evaluation and placement, she had withdrawn him from Bristol-Plymouth, (See, Exh. S-1) Accordingly, in my opinion David was not enrolled in Bristol-Plymouth at the time he was referred for evaluation. Unlike the provisions governing responsibility for provision of special education services applicable to regional vocational technical school, Section 202.1, requires school committees of cities, towns, and regional academic districts to provide special education to school age children who live in their jurisdiction. There is no requirement that such students be enrolled in their school district. Thus, when David ceased to be enrolled at Bristol-Plymouth, he once again became the responsibility of Middleboro.

I am aware that this conclusion may be subject to the criticism that it could invite manipulation on the part of vocational technical schools, like Bristol-Plymouth. Simply by withdrawing David, who was a student in good standing from Bristol-Plymouth, Mrs. D. shifted the legal obligation for provision of special education to her son from Bristol-Plymouth to Middleboro. Jeff Green's dual roles as private therapist treating David, and his position with Bristol-Plymouth raises obvious questions of conflict of interest. Similarly, the advocate for Mrs. D. strongly expressed her opinion that it would be unfair for Bristol-Plymouth to be required to provide a residential program for David, and opposed a legal interpretation that a vocational technical school district could ever be required to provide a day or residential special education program to one of its students.

Nevertheless, there is no evidence on the record before me upon which I can conclude that Mrs. D.'s decision to withdraw David from Bristol-Plymouth was induced by any official of that school, or based on any misrepresentation of David's rights as a Bristol-Plymouth student. In the absence of any contrary evidence, I must conclude that David is not enrolled at Bristol-Plymouth. Middleboro is legally responsible to fulfill the requirements of the special education statutes and regulations with respect to David. Accordingly, Middleboro's Motion to Dismiss is denied.

B. PLACEMENT UNDER SECTION 327.1

Section 327.1 of the Chapter 766 Regulations (603 C.M.R. s.28.00.327.1) provides that:

A child who, at the time of referral for evaluation, was in the regular education program shall remain in that regular education program unless the school committee or the child's parents initiate a hearing before the Bureau of Special Education Appeals to show that remaining in such program endangers the health or safety of the child or substantially disrupts such program for other children. If such a showing is made, the Bureau shall approve an appropriate interim placement for the child within thirty (30) days of initiation of the hearing.

In the case before me, David has never been identified as a special needs student. However, in my opinion there is sufficient evidence on the record me to conclude that David is a student whose emotional/psychological needs are such that he is in need of an appropriate interim placement, pending completion of a formal special education evaluation, as set out in the rulings and order below. In my opinion if David were to remain in a regular education program, pending completion of an

evaluation and agreement on a placement or resolution of a dispute over such placement by the BSEA, it would result in harm to David. Thus an immediate interim placement is necessitated.

Even though David has yet to be formally identified as a special needs student, there is strong and credible evidence to support a conclusion that David should have been identified as a school age child with special needs, as early as June 1990. His long-standing and persistent emotional/psychological difficulties demonstrably have had an adverse impact on David's ability to progress effectively in the public school setting. The READS evaluation conducted in May 1990 stated clearly that David was a child in need of special education services and called for Middleboro to provide him with psychotherapy, counseling, and special education remediation to address the adverse impact that David's depression had on his ability to progress in school. There is no explanation as why the TEAM made a finding of no special needs in the face of the recommendations of the evaluation which served as the basis for the TEAM's decision.

Rather, even the limited record before me points clearly to a young man with strong cognitive skills, which are significantly compromised by his persistent and long-standing emotional/psychological disability. Further, to the extent that David has had periods where he has made satisfactory progress in school (albeit below his high cognitive potential), such progress must be fairly attributed to the intervention of David's private therapists. Unfortunately, the record suggests that David's capacity or willingness to cooperate with his therapy has been intermittent. It also appears that he has a pattern of seeking to discontinue therapy, when it is most focused on addressing his family and school problems. In sum, I conclude that it is essential that David is in immediately need of appropriate special education.

However, concluding that David should be placed in a special education program pursuant to my authority under Section 327.1, does not resolve the question of whether David requires a residential special education program, as requested by Mrs. D. While there is considerable evidence on the record regarding the nature of David's special needs, the evidence regarding an appropriate placement is very limited and conflicting.

Apart from David's mother, the primary evidentiary support for a residential placement for David was provided by Jeff Green and David's psychiatrist, Dr. Richter. However, until July, Mr. Green's efforts were entirely focused on encouraging and supporting David's regular education program at Bristol-Plymouth. It is only within the last few weeks that his opinion has sharply changed. I am also troubled by the fact that Mr. Green did not refer David for a special education evaluation while at Bristol-Plymouth, or indeed, counsel Mrs. D. to seek such an evaluation

from Middleboro, prior to David's transfer to Bristol-Plymouth. He appears to have encouraged Mrs. D. to leave the entire question of David's educational program to him, a decision which in retrospect may have only delayed the obtaining of the comprehensive psycho-educational information necessary to develop an appropriate special education program for David. The difficulties in addressing David's educational needs have been exacerbated by the fact that special educational staff in Middleboro and Bristol-Plymouth have had no contact with David, and as a result have had no basis for making a judgment about the best way to meet David's needs. (Testimony of Serry, Dumais)

Dr. Richter's opinion regarding David's need for a residential placement is set out in a brief statement prepared for this hearing. The diagnosis contained in the statement presents the most extreme view of any of the evaluations regarding the severity of David's psychological state. However, it does not spell out the underlying basis for Dr. Richter's opinion in any detail, and is, therefore, of somewhat limited assistance. (Exh. P-6)

In contrast, the staff at the Cape Psych Center saw no basis for a recommendation of residential placement. They did not see David's psychological state as requiring such a restrictive setting, nor believe him to be suicidal or aggressive. They do, however, call for David to move to a living situation away from his family, perhaps in foster care. They do not explain how a foster family would be able to address David's emotional problems, how such a living situation would relate to David's educational program, nor, indeed, whether DSS could be relied upon to provide such a living situation. In short, the recommendation does not appear to address the totality of David's needs.

Moreover, because this hearing of necessity has been conducted on expedited basis, there was insufficient opportunity for any party to fully explore specific placement options. Thus, there is no evidence upon which to conclude that any specific program would be appropriate for David.

Nevertheless, I am deeply concerned that David's emotional/psychological state is fragile, and his ability to cope in a regular education setting, even with support such as he has received during the time he was at Bristol-Plymouth, will not be sufficient for him to make educational progress. Nor am I persuaded that one can safely assume that the emotional stresses and anger that David manifests at home will not carry over to a greater extent in the school setting than they have to date. In the face of uncertainty about what special education program will be able to provide for David's maximum educational development, and the need to assure that he receive an educational program which is the product of a comprehensive TEAM evaluation, I find

that the best option available is to order that David receive diagnostic evaluation under the provisions of Section 502.9 of the Chapter 766 regulations. (603 C.M.R. s.28.0.502.9)

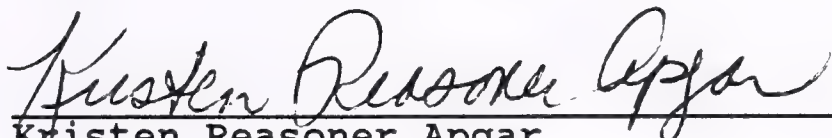
The diagnostic evaluation shall be comprehensive in nature, in particular providing assessments in the psychological, educational, neurological areas. It shall address the extent to which David's family-related issues affect his ability to progress in school, including his ability to interact appropriately with peers. It shall also address what educational setting can provide for David's therapeutic needs, while at the same time permitting him to develop his high cognitive potential. During the time that the diagnostic evaluation is in process, David shall be placed in a residential special education setting. (See, Section 502.9(d)) At the end of the diagnostic period, the evaluation TEAM shall reconvene to make a placement. If there is dispute regarding the proposed IEP, I shall retain jurisdiction to reconvene the hearing to resolve such dispute and to order an appropriate program. The TEAM shall, if necessary, seek the assistance of the Bureau of Program Audit and Assistance of the Division of Special Education of the Department in locating a suitable residential program for the purposes of the diagnostic evaluation. Middleboro shall take steps and the parent shall cooperate in involving DSS, Department of Mental Health, or any other suitable agency, which may be able to provide appropriate services to David.

In the event that it is not possible to identify an approved residential special education program that will admit David for the purposes of completion of the diagnostic evaluation, David shall instead receive a comprehensive, in-patient evaluation at a facility which is able to address issues enumerated above. Following this evaluation, the TEAM shall meet to propose an appropriate special education program for David. If there is a dispute regarding the proposed program, at the request of any party, I will reconvene the hearing to order an appropriate program.

ORDER

Middleboro is ordered to convene a TEAM in order to implement the diagnostic evaluation, as set out in the decision above, which the reconvening of the TEAM and the provision of an appropriate special education program to ensue immediately thereafter. If it is not possible to implement the diagnostic evaluation in the manner prescribed in this decision, Middleboro shall arrange for a comprehensive in-patient evaluation for David, with the convening of the TEAM and provision of an appropriate special educational placement to follow immediately upon its completion.

By the Hearing Officer


Kristen Reasoner Apgar

Date: August 17, 1992

THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: RANDY C.

BSEA #93-0219

DECISION ON MOTION

This matter comes before the Bureau on the Motion of the Avon Public Schools to dismiss the request for hearing filed by the parent pursuant to M.G.L. 71B and 20 U.S.C. 1401 et seq. The school asserts that the Bureau of Special Education Appeals lacks jurisdiction to hear this appeal because it arises out of the interpretation and application of a regular education statute, the school-choice law, M.G.L. c.76. The parent contends that the school is invoking the school choice law to shield it from the Bureau's inquiry into its special education practices. Both parties submitted written memoranda outlining their respective positions, and made oral arguments at a Motion Hearing held on August 26, 1992.

Briefly stated the pertinent undisputed facts are these: Randy is a 14 year old student with special learning needs. During the 1991-1992 school year Randy, a resident of Brockton, attended the Avon Public Schools under the school-choice plan. Randy received special education services throughout his 8th grade year at Avon Middle High School. Randy applied to Avon for readmission as a "choice" student on May 1, 1992. (Exh. S-3) By letter dated June 3, 1992, the parent was notified that Randy would be retained in 8th grade due to failure to meet the regular attendance policy of the school. (Exh. S-11)

There were several TEAM meetings throughout the school year. (Exhs. P-28, 29) At the last TEAM meeting, held on June 12, 1992, the TEAM developed an IEP providing for academic support and occupational therapy for Randy. The parent rejected the plan in part, and accepted the occupational therapy services. (Exh. P-31) By letter dated July 22, 1992, Randy's lawyer was notified that Randy would not be re-admitted as a choice student to the Avon Public Schools because the 8th grade was oversubscribed with resident students. (Exh. S-9) Avon returned Randy's school records to Brockton. The parent seeks to have Randy enrolled as a ninth grade student at Avon Middle High School alleging that: 1.) Randy's unexcused absences represent an unserved special education need; and 2.) The decision to retain Randy in the 8th grade reflects discriminatory intent to reject Randy as a choice student.



Viewing the facts in the light most favorable to the parent, as required, it appears that the special education issues and the regular education issues presented by this case are inextricably intertwined. It is true, as Avon argues, that the Bureau of Special Education Appeals has no jurisdiction to rule on purely regular education issues. It is, however, the role of the Bureau to ensure that students with disabilities receive the free, appropriate educational services to which they are entitled under federal and state law. The Bureau may certainly consider whether a regular education practice or policy affects the delivery of appropriate and equitable services to students with disabilities. And where state or local rules impede the effective delivery of special education services guaranteed under federal law, federal law prevails.

Here, it appears that there is a tension between a state school choice program and the state and federal laws governing special education. As a student enrolled in the Avon Public Schools through the school choice program, Randy is entitled to participate in all school programs and services on the same basis as a resident student. By accepting Randy as a school choice student, Avon undertook an obligation to provide a free, appropriate public education to him as guaranteed under federal and state laws. This obligation has both substantive educational and procedural due process components. Central to this matter is the so-called "stay put" provision. Pending resolution of any dispute concerning the delivery of educational services to a handicapped student, the student must continue in the then current educational placement. See 20 U.S.C. 1415; 34 CFR 300.513; 603 CMR 327. Randy's placement at the time a dispute about his educational services arose was a 502.2 program in the Avon Public Schools. Absent an order or agreement to the contrary, Randy has the right to continue in that placement. Absent an order or agreement to the contrary, Avon continues to be the entity responsible for delivery of all educational services to Randy. Whether Avon may terminate its obligation to Randy under the provisions of the Massachusetts school choice program is a question of construction of a regular education statute. The Bureau does not have the authority to interpret or apply a regular education statute. The Bureau's obligation is to ensure that the due process rights of the special education student and parent are observed. Requiring Avon to offer Randy special education services pending the Bureau's resolution of the substantive educational dispute and the Court's interpretation of the school-choice law, comports with federal and state procedural due process guarantees.

Therefore, the Motion of Avon Public Schools to Dismiss this appeal on jurisdictional grounds is denied. Pursuant to 20 U.S.C. 1415 and 603 CMR 327, Randy is entitled to receive special

education services through the Avon Public Schools. The parties shall contact the Hearing Officer within ten days of this decision to schedule the hearing on the substantive issues raised in this appeal.

By the hearing officer



Lindsay Byrne
Hearing Officer

Date: August 27, 1992

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF EDUCATION
BUREAU OF SPECIAL EDUCATION APPEALS

IN RE: RANDY C.

BSEA #93-0219

This matter comes before The Bureau on the student's Motion for Compliance with the decision issued by this Hearing Officer on August 27, 1992, in the above-entitled appeal. That decision determined that the "stay-put" provisions of 20 U.S.C. 1415 (See also 34 CFR 513, 600 CMR 327) operated to permit Randy to attend the Avon Public Schools as a non-resident student. The decision did not address Randy's grade placement within the Avon Public Schools. Avon intends to retain Randy in the 8th grade for the 1992-1993 school year. As reason therefore Avon states that Randy accumulated 19 unexcused absences during the 1991-1992 school year. Avon's absence policy applies to all students. There is no evidence that the absence policy applies only to special education students or programs. The student requests that he be promoted to the ninth grade with the majority of his class. The student argues that the "stay-put" provision of the applicable state and federal special education laws require his promotion from grade to grade with his peers, regardless of the regular disciplinary code. This argument must be rejected. Retention/Promotion decisions for regular education grade placement are regular education decisions not covered by the "stay-put" provisions of special education laws, and not properly within the purview of The Bureau of Special Education Appeals. Therefore the student's Motion for Compliance Orders is DENIED. The parties shall contact the Hearing Officer to schedule the hearing on the merits.

September 9, 1992

Lindsay Byrne
Lindsay Byrne
Hearing Officer

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CHARLESTOWN, MASS

